

Comprehensive Judicial Reform Strategy for Bosnia and Herzegovina

“Without the rule of law and an independent and impartial judiciary, there can be no future for Bosnia and Herzegovina as a modern, prosperous European nation. No safeguards for the people of either Entity. No prospect of large-scale investment from outside. No chance of closer association with the European institutions. Building the rule of law, founded on an independent judiciary and a reliable police force, will be a top priority for 1999.”

Annex to Madrid Declaration of the Peace Implementation Council

July 1999

***Office of the High Representative
Emerika Bluma 1, 71000 Sarajevo
Telephone: +387 71 447 275
Fax: +387 71 447 420***

A Comprehensive Judicial Reform Strategy for Bosnia and Herzegovina

A coherent, comprehensive strategy is essential to any sustainable development of the Rule of Law. Such a strategy has at its core the reform of the judiciary and the development of a criminal justice system that promotes law and order while remaining sensitive to the rights of the individual.

The Constitution of Bosnia and Herzegovina (BiH) provides that BiH shall be a democratic state which will operate under the Rule of Law and obliges the state and entity governments to ensure the highest level of internationally recognized human rights and fundamental freedoms.

The implementation of these constitutional objectives depends upon a judiciary which protects the innocent, punishes the guilty and resolves disputes in a timely, fair and impartial manner. A strong, effective and independent judiciary in Bosnia and Herzegovina will be a corner stone in developing democratic structures and a positive force for economic and social development. The development of a legal framework will provide local officials the tools necessary to effectively address the major criminal initiatives currently present in BiH, including corruption and organized crime.

Until the rule of law is established in BiH, the foreign investment necessary to build and sustain a vibrant economy will be directed to countries with a more stable and secure legal environment. Without an increase in investor confidence in the legal environment, economic recovery will not be realized.

Judicial reform is also essential for building confidence and fostering peace and reconciliation in this war-torn country, and in that way it is a key element in providing conditions for the sustainable return of refugees and displaced persons.

The priorities and goals of the strategy will be developed in coordination with the international community to ensure the support and participation of implementing organizations. Strict conditionality must be applied when local officials delay or obstruct efforts to implement the strategy. Local officials must be made aware that the High Representative will not be reluctant to use his authority to remove obstructionist officials or impose necessary law.

Strategy Overview:

Structural Reforms:

- Establishing a multi-ethnic, independent and professional judiciary through a judicial selection process that is independent of governmental and political interference, that provides for adequate salaries, codes of ethics and discipline and dismissal provisions, as well as a review of the qualifications and performance of sitting judges. Legislation has been drafted in both entities which contain these elements.
- Strengthening the roles of the Entity Prosecutors to ensure a uniform enforcement of laws throughout the Entities. Legislation has been drafted in the Federation to allow the Federation Prosecutor to issue mandatory instructions to cantonal prosecutors and to take

over the case if they cantonal prosecutor does not comply with the instruction. It also provides the Prosecutor with the authority to prosecute Federation level crimes in Federation courts. Provisions to enhance the authority of the Republika Srpska prosecutor will be included in the Phase I revisions to the Republika Srpska Code of Criminal Procedure.

- Revising cantonal and Federation law to ensure the ability to transfer cases between courts when there is evidence that it will not be possible to receive a fair and impartial hearing in the original venue.
- Developing witness protection and witness anonymity laws in both entities to encourage testimony and ensure the protection of witnesses in criminal cases.
- Ensuring that all citizens of the Federation have equal access to the Federation Supreme Court regardless of the canton in which they live. The jurisdiction of cantonal courts must be revised where necessary to ensure that the ability to appeal a case beyond the cantonal courts exists.
- Expanding the role of the Federation Supreme Court to provide original jurisdiction for Federation level crimes, which include most criminal acts related to return related violence. Draft legislation is currently before the Federation Parliament that which establishes a trial department in the Supreme Court for these crimes.

Institution Building:

- The establishment of Judicial Training Centers that will streamline and consolidate training standards throughout Bosnia and Herzegovina.
- Expansion of the Commission on Inter-Entity Legal Co-operation to enhance efforts to make justice consistent throughout Bosnia and Herzegovina. This critical body is in the process of being reconstituted and will resume its important role in promoting cross-boundary legal co-operation.
- Computerization of the judiciary, which would include basic computer availability for courts and prosecutors offices for case management purposes as well as research capability and inter-office links to increase efficiency.
- Working toward full implementation of the Brcko Arbitration Award. Specifically, attention must be paid to the harmonizing of existing legislation and the drafting of new legislation that will provide a legal system not subject to the control of either entity. As the Arbitration Decision and Annex are not yet finalized, this initial version of the strategy will not address the Brcko situation in any detail. An analysis of the Brcko structure will be contained in future versions of the strategy.
- Developing and regularizing the process for admission to the legal profession and the ability to practice before all courts at the state and entity levels.

Improving Access to Justice:

- Making legal advice available to people throughout Bosnia and Herzegovina. Programs currently in existence need to be supported and expanded as much as possible.
- Increasing the amount of legal information and materials available to judges and practitioners. This should follow on the notable efforts of OSCE and the Council of Europe in providing law books, law commentaries and other documents helpful to practitioners.
- Educating the public, the “consumers” of the judicial system, of the reforms taking place and their rights and access to courts. Establishing a base line of information regarding the current state of public opinion is an essential first step before a determination can be made as to which public information programs will be most efficient.

Law Enforcement and Corrections:

- Coordinate the efforts of the International Police Task Force to ensure they are synchronized with the other reforms and developments in the area of judicial reform.
- The prison/corrections systems of each entity must meet international standards. Initial reviews by the Council of Europe experts have provided an overview of the current status of the prison systems and identified areas which need improvement. Expert assistance and financial assistance will be essential to complete this process.
- The Judicial/Court Police need to have their role clarified. They must ensure security of court proceedings and that court orders are implemented. Needs assessments will be undertaken to determine whether and to what extent existing legislation must be amended or changed.

Prioritization of Judicial Reform Efforts:

It is recognized that international resources are likely to be reduced over time in Bosnia. For that reason, careful attention must be paid to the cost of the various projects and supporting efforts designed to advance the strategy’s goals. (The estimated costs for a number of judicial reform projects are contained in Appendix 2.) The prioritization of projects is based upon the need for the particular project or reform within the overall reform effort. This is achieved by determining the time period in which the project or reform must be completed to effectively move the strategy to its next level. The prioritization is a reflection of ongoing and planned activities and will be updated and revised as developments warrant.

Priorities are delineated by categorizing the projects and reforms which have similar levels of urgency into “tiers”. The “tiers” address the completion of the projects and not necessarily the commencement of projects. Work on projects in lower tiers may therefore be ongoing or commence at the same time as projects in higher tiers.

Tier 1 - Near Term (to be accomplished within 3 to 6 months)

- Adoption of laws to make the judiciary and prosecutors more independent and effective and to ensure that all citizens of the Federation have the equal ability to appeal decisions to

the Federation Supreme Court. Also the adoption of laws ensuring witness protection and the development of procedures to ensure protection of prosecutors and judges in sensitive cases. This effort includes the close monitoring of the laws once they are enacted to ensure their effective implementation.

- Develop plans for state-level judicial institutions to provide for uniform application of legal standards nationwide. This includes practical efforts to establish the necessary state-level courts and a properly funded BiH Constitutional Court. It also includes efforts to revive the Commission on Inter-Entity Legal Co-operation.
- Focus on locations with special regimes or unique situations such as Brcko and Mostar. In the case of Brcko, specific actions by the international community are required to implement the Arbitration Award. In the case of Mostar, constant vigilance will be required to ensure that continuing progress is made in establishing a unified multi-ethnic judiciary.
- Establish a judicial training center in the Federation and lay the groundwork for the establishment of a companion center in the Republika Srpska, coordinated by a joint board of control.

Tier 2 - Intermediate Term (to be accomplished in 6 to 12 months)

- Monitor and coordinate the efforts of the international community to ensure the development of professional, multi-ethnic law enforcement departments in both entities. Complete a needs assessments regarding the Judicial Police and their core functions. Implement the recommendations for improvements in the corrections systems in both entities.
- Develop strategies to streamline and regularize the process for becoming a lawyer in both entities. This includes determining the role of the courts and bar associations, determining admission requirements, disciplinary procedures and issues regarding reciprocity for practice across boundary lines.
- Complete the initial computerization of the judiciary and prosecutors' offices in the Federation and Republika Srpska.
- Continue providing training for judges and lawyers in areas relevant to improving their understanding of new laws, new judicial/legal structures, the new roles of the prosecutors and defense lawyers and the role of constitutional argument in the new legal system of Bosnia and Herzegovina.

Tier 3 - Long Term (to be accomplished in 12 months or more)

- Increase public access to justice by continuing support for ongoing efforts to supply legal advice and legal assistance to Bosnians unable to pay for legal services.
- Determine public attitudes towards the Bosnian legal system through the use of polling and seek means to improve public understanding of their legal rights through public information campaigns.

- Increase the amount of legal information available to judges and lawyers through continuing publication efforts such as those already undertaken by Council of Europe and OSCE.

Appendix 1- The Strategic Plan

Introduction

Without the rule of law and an independent and impartial judiciary, there can be no future for Bosnia and Herzegovina as a modern, prosperous European nation. No safeguards for the people of either Entity. No prospect of large-scale investment from outside. No chance of closer association with the European institutions. Building the rule of law, founded on an independent judiciary and a reliable police force, will be a top priority for 1999.

Annex to Madrid Declaration of the Peace Implementation Council

Through the efforts of the international community, coordinated by the Office of High Representative (OHR), significant progress has been made in Bosnia and Herzegovina (BiH) since the adoption of the General Framework Agreement for Peace (GFAP) in 1995.¹ Following adoption of the GFAP, the initial efforts of the international community in BiH naturally focused on restoring peace, rebuilding crucial infrastructure, reconstructing the economy, returning people who were displaced or fled the country during the war, ensuring respect for human rights and establishing democratic elections.

The establishment of the rule of law is an absolute prerequisite for many of these efforts and while a number of rule of law (judicial) reform projects were initiated by OHR and other international organizations, most of the initial efforts were on an *ad hoc* basis without any formal coordination. As judicial reform efforts increased, OHR initiated coordination efforts which were recognized by the Bonn Peace Implementation Conference (PIC) in December 1997 as it endorsed "...the High Representative's coordination of the various judicial and legal reform programs with a coherent and focused program..."

This process became more formalized when, in response to a recommendation of the OHR Human Rights Task Force, a Judicial System Reform Coordination Group was established, comprised of the international organizations and non-governmental organizations involved in the various judicial reform efforts in BiH. The purpose of this Group was develop a coordination structure for the efforts of the international community in the judicial reform area.

The Luxembourg Peace Implementation Council, meeting in June 1998, called for expanded judicial reform efforts to be coordinated by the High Representative. Specifically mentioned by the Luxembourg PIC were the creation of an independent judiciary, revision of the criminal codes and a strengthening of the Federation Prosecutor's office. Priorities were developed by OHR in consultation with other international organizations and progress was set forth in a September 1998 paper entitled "Judicial System Reform Plan and Midyear Report".²

¹ The GFAP or Dayton Accords were initialed on 21 November 1995 in Dayton, Ohio and were signed on 14 December 1995 in Paris.

² This paper was provided to the Peace Implementation Council Steering Board in September, 1998.

The Madrid PIC in December 1998 again emphasized that the establishment of the rule of law and the need for judicial reform were high priorities.

The Council emphasized the importance of intensified judicial reform efforts, coordinated by the High Representative, to support the efforts of the authorities in BiH. In 1999, it urges the High Representative to further develop a comprehensive judicial reform strategic plan, identifying short and longer-term priorities, in consultation with the authorities, the Council of Europe, OSCE, UNMIBH and other organizations. It welcomes the establishment of UNMIBH's Judicial System Assessment program to examine technical, institutional and political impediments to judicial reform, and looks forward to its full integration within the High Representative's judicial reform strategic plan. It also welcomes the cooperation of the Council of Europe, OSCE and other agencies in a coordinated program of judicial restructuring and training. The Council calls upon all international and non-governmental organizations, as well as government and donors able to support judicial reform in BiH, to cooperate fully with the High Representative in the development and implementation of the plan.

This document constitutes the **comprehensive judicial reform strategic plan** called for by the Madrid Peace Implementation Council. For purposes of this strategy, OHR has defined **judicial reform** to include not only the judiciary, but all aspects of the criminal justice system, from the initial investigations by police, through prosecution, trial and appeal, to the correctional system. In order to encompass the **comprehensive reform** mandated by the Madrid PIC, all areas interrelated to the judiciary must be included in the reform efforts.

Having said that, however, there are several areas which are not included in the strategy. The initiatives involved in the international community's anti-corruption efforts are contained in the Anti-Corruption Strategy approved by the Steering Board in March of this year. Reform efforts in civil law, administrative law and commercial law are not contained within this definition of "judicial reform" but are the focus of a separate OHR strategy.

The goal of the strategy is to build toward a genuine rule of law in Bosnia and Herzegovina in which all citizens have real confidence and receive equal respect. The Constitution of Bosnia and Herzegovina provides that **Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law**. It further obliges **Bosnia and Herzegovina and both Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms**.³

The successful implementation of the objectives set forth in the BiH Constitution depends upon a judiciary which protects the innocent, punishes the guilty and resolves disputes in a timely, fair and impartial manner. A strong, effective and independent judiciary in Bosnia and Herzegovina will be a corner stone in developing democratic structures and a positive force for economic and social development.

Until the rule of law is established in BiH, the foreign investment necessary to build and sustain a vibrant economy will be directed to countries with a more stable and secure legal environment.⁴ Without an increase in investor confidence in the legal environment, economic recovery will not be realized.

³ BiH Constitution, Articles I.2; II.1

⁴ In a recent Wall Street Journal Central European Economic review, a group of international economists ranked 27 countries in the region as a place to do business. One of the ten categories which was analyzed was "Rule of Law". While BiH tied for 24th place overall with Albania, it was ranked 26th in the Rule of Law category,

Judicial reform is also essential for building confidence and fostering peace and reconciliation in this war-torn country, and in that way it is a key element in providing conditions for the sustainable return of refugees and displaced persons.

Unfortunately the current judicial system does not ensure independence or impartiality in either Entity of Bosnia and Herzegovina. Lack of transparency and political involvement occurs at many stages of the judicial process. Under the current structure, judges, prosecutors and all who are involved in the judicial process are vulnerable to political, ethnic and economic pressures, including physical threats and actual beatings. As a result prosecution of orchestrated violence against returnees is often inadequate or completely lacking and courts frequently fail to ensure respect for the rights of members of an ethnic minority. Decisions of courts, including judgments of the Human Rights Chamber, are regularly not enforced. The judicial system is both individually and institutionally incapable of applying the standards of the European Convention on Human Rights (ECHR) or of effectively administering justice.

The loss of skilled members of the legal profession and the judiciary as a result of the war, as well as the physical destruction caused by the war, continue to affect the judiciary in both Entities. A lack of proper equipment and facilities hampers both prosecutors and courts in carrying out their responsibilities. Training in the new laws and conventions is needed for judges, prosecutors and attorneys. The public, which currently has little faith in the judicial system, must be made aware of the reforms which are necessary and the ones which have been completed, if confidence in the system is to be restored. All of these problems are further exacerbated by the complexities of the recently established legal framework in a two-Entity state, with judicial powers further devolved to Cantons in the Federation.

While much has been accomplished since the initial judicial reform efforts in 1996, a great deal remains to be done. This strategy document identifies areas in the various sectors of the judiciary and criminal justice system which are in need of reform, i.e. police, prosecutors, courts/judges, defense attorneys, and corrections. **(Sector Analysis)** It discusses what has been accomplished, what needs to be accomplished and which organizations or government agencies are responsible for implementing the reforms in each sector, and assigns timelines to each project. This analysis is followed by discussion of initiatives which either apply to all the sectors or have unique application to judicial reform, i.e. inter-entity legal cooperation; legislative reforms; dissemination of legal material; and public awareness. **(Judicial System Initiatives)** Accomplishment of these judicial reform efforts are critical to the success of virtually all other reform efforts in BiH.

It is recognized that many of the projects contemplated to effect this process are extremely costly. The international community, including governments, international organizations and non-governmental organizations, have been and will continue to shoulder the enormous burden of supporting this effort. To that end, OHR and its partners in this process must always be aware of the costs involved in advancing relevant projects. The estimated costs for a number of judicial reform projects identified in this strategy were prepared for the February 1999 Pre-Donor's Conference and are included in Appendix 2.

ahead of only Tajikistan. Other countries which comprised part of the former Yugoslavia received respectable rankings in the "Rule of Law" category with Slovenia ranked 4th and Croatia ranked 8th. (Wall Street Journal Central European Economic Review, December 1998 - January 1999)

Part 1. Sector Analysis and Reforms

While reform of judicial institutions is the cornerstone of the Rule of Law, meaningful reform will not be attained without concurrent reforms in the other sectors involved in the judicial

process. The sequence in which the sectors are analyzed in this section of the strategy is not intended to reflect the relative importance each sector as each is independently critical to the overall functioning of the system.

I. COURTS AND THE JUDICIARY

A. Constitutional Courts

1. Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, established by the BH Constitution, has exclusive jurisdiction over disputes between BH, the Entities and/or institutions of BH. It also has appellate jurisdiction over issues under the BH Constitution arising out of judgments of any other court in BH. Its decisions are final and binding. The Court has six national and three international members. It held its constituent session on 23 May 1997 and has held 8 (?) subsequent sessions, passing more than 15 (?) decisions, most of which have regarded procedural issues. Since its establishment, the BH Constitutional Court has been faced with a very difficult financial situation which seriously jeopardizes its ability to function.

Important technical and material assistance has, however, come from OHR, along with CoE, ABA/CEELI and EU/Phare, including a 1997 CoE-organized study visit to the European Court of Human Rights and long term technical assistance provided since July 1998 by EU/ Phare. The latter includes the appointment of a full-time international expert working with the Court in Sarajevo; the purchase of equipment; and the organization of various study visits, seminars, and conferences. The project does not, however, cover salaries or any other costs related to the daily operations of the Court.

The Venice Commission has also provided expertise, most recently pointing out the advantages of a merger between the Court and the BH Human Rights Chamber. Such a merger would resolve the problem of overlapping competences between the two bodies and create a single jurisdictional body at the BH State level *exclusively* competent to decide appeals from any other court in BH based on the BH Constitution—including its human rights provisions.

As these changes are implemented, public awareness of the Court's competences, including its appellate jurisdiction over issues under the BH Constitution arising out of any judgment of any court in Bosnia and Herzegovina, should be promoted¹. By adequately exhausting its appellate function, the BH Constitutional Court could become an essential and overarching guarantor of the uniform application of laws and human rights standards at both the State and Entity levels. An excellent public awareness precedent was set by April and October 1998 conferences, organized by OHR as well as CoE, EU/Phare, the Venice Commission, and ABA/CEELI, which brought together judges of the three Constitutional Courts in BH with domestic and international lawyers.

The Constitutional Court has an indispensable role to play in the political development of Bosnia and Herzegovina, both as the final interpreter of the Constitution and in its potential

¹ See Chapter I., 4.1.1. of this report and the non-applicability of this provision to the Human Rights Chamber.

role as a single final appeals instance at the BH State level. However, the Court's independence must be guaranteed in order for this potential to be met. A first step in this respect would be the improvement of the financial situation of the Court, allowing the hiring of professional staff to handle the administrative needs².

Finally, as in other fields of the judiciary, the implementation of the Constitutional Court's decisions remains a problem and needs to be addressed with the relevant authorities. **NOTE: Is this true or are we getting ahead of ourselves?**

Action Plan

As a first priority, the Court's financial situation must be stabilised immediately in order to facilitate its current work. Such stabilisation must result both from implementation of the BH Council of Ministers' obligation to fund the court and from voluntary donor funds. With regard to the longer term goal of merger with the BH Human Rights Chamber, a working group of international legal and administrative experts will be set up under the auspices of OHR and the Venice Commission to consider the issues involved. In particular, the working group will identify the procedural, administrative, financial, and other practical ramifications of such a merger and make recommendations regarding the best means of accomplishing it.

In addition, A conference for constitutional court presidents from Central and eastern Europe is planned in cooperation with EC/Phare, CoE, and the Venice Commission in the summer of 1999.

2. Federation of Bosnia and Herzegovina

The Federation Constitutional Court was established in 1997 and consists of nine judges, three of whom are international. It has rendered several significant decisions, including a 25 May 1998 judgment that powers vested exclusively with the Federation cannot be transferred to the Cantons. The Federation Constitutional Court currently holds sessions every 2-3 months and is up to date with its case load.

For the past year, ABA/CEELI has been assisting the Federation Constitutional Court to develop a number of capacities: dissemination of its decisions; institutional mechanisms for drafting its own budget request; staffing of its office; and electronic communication systems allowing the Court's international judges to remain active from their respective remote locations. The Association of the Judges of the Federation of Bosnia and Herzegovina is also preparing a training program for practicing lawyers and judges on principles of constitutional advocacy, including procedures and strategies for raising constitutional issues in trial courts, procedures for obtaining review by higher courts, and techniques of constitutional decision-making and opinion-drafting.

Action Plan

² When drafting the 1998 State Budget, the Council of Ministers did not take the actual needs of the Constitutional Court sufficiently into consideration and based its cost estimation on abstract figures without even consulting the President of the Court. Given the importance of establishing the Court's independence from the executive power, the Court needs to control over its own financial means, allocated by the Budget independently. A separate (sub)budget needs to be drafted which is sufficient to cover all expenses necessary for the Court's functioning.

Continue support for training efforts undertaken by ABA/CEELI both regarding infrastructure and training.

3. Republika Sprska

The RS Constitutional Court derives its legal basis from Chapter IX of the RS Constitution. **We are awaiting further details from Jose Maria**

In order to highlight the role of this Court, the aforementioned October 1998 meeting between judges of the three Constitutional Courts in BH, organised by OHR as well as CoE, EU/Phare, and ABA/CEELI was held at the Court's seat in Banja Luka. The conference demonstrated that the RS Constitutional Court is in great need of virtually any kind of support. To date, the court does not even have its own telephone link and largely depends on outside material and financial support, making it particularly subject to influence.

Action Plan

As the next step, the international community will have to identify resources for a project assessing the most immediate needs of the Court and providing assistance as appropriate. Implementing partners must be identified to do a needs assessment of the RS Constitutional Court. They should be ready to devise a strategy to address immediate needs and implement required changes.

B. Human Rights Institutions

While not a part of the regular court system in BiH, there are human rights institutions at both the BiH and entity level, which have many of the same judicial characteristics as regular courts, and must be included in any discussion of the judiciary. These include the Human Rights Commission, the Federation Human Rights Court, and the Commission for Real Property Claims of Displaced Persons and Refugees.

1. The Human Rights Chamber of Bosnia and Herzegovina

Annex 6 of the GFAP provides for a Human Rights Commission consisting of two bodies: the Office of the Human Rights Ombudsperson and the Human Rights Chamber. The Chamber operates as a judicial body. Together they are responsible for examining alleged or apparent violations of human rights in BiH as guaranteed in the ECHR. This human rights protection mechanism is scheduled to last for five years after entry into force of the GFAP (14 December 1995). After that period of time, the responsibility for the continued operation of the Commission on Human Rights is to be transferred to the institutions of BH, unless the Parties agree otherwise.

Recently, the Human Rights Chamber and the Ombudsperson have been acting more independently from each other, and the notion of one "Human Rights Commission" has been eroded by the Ombudsperson's role moving to that of a more traditional ombudsperson. The Chamber retains a more juridical approach to cases, and the Ombudsperson remains as a more flexible and negotiation-based mechanism for the resolution of cases. For example, the Ombudsperson now does not publicize her findings until after the deadline for compliance by

the governments has expired. In addition, she has taken a more flexible approach with respect to procedural requirements such as exhaustion of local remedies.

Compliance with the decisions of the Human Rights Chamber and recommendations of the Office of the Ombudsperson has been increasing in the first half of 1999. This has been due in large part to the establishment of the offices for legal representation of the governments in both the RS and the Federation, in late 1998 and early 1999 (also known as the “agents” or “liaison officers” of the governments). These offices are responsible for presenting legal arguments of the governments before the Chamber and the Ombudsperson, for reaching friendly settlement of pending cases, as well as ensuring implementation of the orders and recommendations of Annex 6 bodies when a violation of the rights of the applicant is found. In addition, recent changes in Federation legislation aiming at rectifying violations associated with military apartments will in all likelihood drastically increase statistical compliance with the decisions and recommendations of the institutions (in the case of the Chamber, from 10% to over 80%). The Ombudsperson has been reporting increased cooperation between her office and the government representatives, leading to increased compliance as well. To mid-1999, the Chamber had registered over 2100 cases and had decided over 200, and the Ombudsperson had registered over 3000 cases, and decided over 1000.

The Venice Commission has completed its “*Preliminary Proposal for the Restructuring of Human Rights Mechanisms in Bosnia and Herzegovina*”. In it, the Venice Commission states that “it seems both logical and highly desirable to opt for the transferring of competence on all final appeals in human rights cases to a single jurisdictional body at the state level, as is the case in most modern continental constitutional systems in Europe.” The Venice Commission therefore proposed that a merger, or transfer of competences, between the Constitutional Court and the Human Rights Chamber take place, stating that “such a ‘transfer’ will require a general restructuring of the Constitutional Court and it is highly advisable that this transfer takes the form of a merger of the Constitutional Court with the Human Rights Chamber.” The Venice Commission will now establish a working group on the precise recommended mechanisms for the transfer.

Action Plan

With respect to the Chamber and the Ombudsperson, the past year has seen a movement from (1) concerns about institutional operational capacity and delays in deciding cases to (2) concerns about implementation. With recent successes in implementation, however, it is expected that the next year will focus on (3) requiring an increase in the number of cases settled prior to final decision, as is the case in many other countries. That is not to say that implementation will not continue to be problematic in many cases, especially where local authorities create obstacles. But the respective governments are now aware of the necessity to implement Chamber decisions, and appear to be acting in good faith to implement most decisions.

The OHR, the OSCE, the Council of Europe and other interested parties will push for increased institutional capacities, increased (and more speedy) compliance with the decisions and recommendations of the bodies, and for the settlement of more cases prior to the hearing and decision. In addition, the OHR, the OSCE and the Council of Europe will continue to work with the Venice Commission to find the best possible arrangement for the Human Rights Chamber following the end of the transitional period. In particular, it will be a priority to ensure that the positive aspects of the Human Rights Chamber are not lost through the transfer of competences.

2. Federation Human Rights Court

The Federation Constitution also authorizes a Human Rights Court in Articles IV.C.5. 18 - 23. The competence of the Human Rights Court extends to any question concerning a Constitutional or other Legal provision relating to human rights or fundamental freedoms or to any annex listed in the Annex to the Constitution. The international members would be appointed in accordance with Council of Europe Resolution 93(6) its Committee of Ministers. The Federation Constitution further provides that the Court shall initially consist of seven judges, three national judges appointed by the President of the Federation and approved by the House of Peoples, and four international judges appointed by the Committee of Ministers of the Council of Europe.

Although the Federation has appointed three judges, who have taken an oath of office, the Human Rights Court has never become operational due to the fact that the Council of Europe has not appointed the international judges. Resolution 96(3) provides that the number of international members of the Court must be greater than the number of national members. Therefore, without the appointment of the international members, the Court cannot be legally constituted. As noted earlier, there is an operational Human Rights Chamber at the BiH level which was created within the framework of Resolution 96(3) and for which international members have been appointed by the Council of Europe. There has been concern that the creation of a second human rights court under Resolution 96(3) would cause duplication and would lead to an unnecessarily lengthy process of exhaustion of remedies.

The Venice Commission has addressed these issues. The Commission noted:

... that the human rights protection mechanism foreseen in the legal order of Bosnia and Herzegovina presents an unusual degree of complexity. The Co-existence of jurisdictional bodies entrusted with the specific task of protecting human rights and of tribunals expected to deal with allegations of violations of human rights in the context of the cases brought before them inevitably creates a certain degree of duplication.

* * * * *

However, duplication should be avoided as it may be detrimental to the effectiveness of human right protection. In particular, it may be advisable to proceed with amendments of the entities Constitutions where the creation of specific human rights bodies may be unnecessary from a legal point of view.¹⁰

The Commission reiterated its position that, considering the mechanism set up by Annex 6 to the Dayton Agreement, the creation of the Federation's Human Rights Court would appear superfluous and runs the risk of slowing down the human rights process.

In its *"Preliminary Proposal for the Restructuring of Human Rights Mechanisms in Bosnia and Herzegovina"*, the Venice Commission elaborated that "establishing the Human Rights Court would unnecessarily complicate the judicial system of both the Federation and the State. Further, it is suggested that the provisions of the Human Rights Court of the Federation in the Constitution of this entity have become inoperative or obsolete by the provisions on the

¹⁰ CDL-INF((96) 9

Human Rights Commission of the Dayton Peace Agreement”. The Venice Commission also considered the possibility of “creating a human rights section within the Supreme Court of FBH, which would not, however, take over the jurisdiction of the unformed Human Rights Court.” It is likely that the Venice Commission will examine this question in more detail in the coming months.

Action Plan

The Venice Commission has recommended previously that the duplication that could be created by the establishment of a Federation Human Rights Court can be averted by amending the Federation Constitution, either by bringing the Court under the aegis of the Supreme or Constitutional Court. It will be up to the Federation which option is pursued, following further examination by the Venice Commission. OHR and other international organizations will continue to monitor the situation.

3. The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC)

The CRPC has received some 180,000 claims for the determination of the legal status of both socially-owned and privately owned property in Bosnia and Herzegovina. To July 1999, the CRPC had over 30,000 decisions in respect of these properties. No hearing on the cases are held, but review proceedings may be brought by interested parties. It operates outside the legal system, and in theory its decisions may currently not be challenged in courts. Implementing legislation in the entities is now being proposed to the governments of the entities.

The Venice Commission has briefly considered the position of the CRPC in the legal order of Bosnia and Herzegovina, writing in its “*Preliminary Proposal for the Restructuring of Human Rights Mechanisms in Bosnia and Herzegovina*”³ that “it would not be possible to integrate this Commission in the legal order of BH without subjecting its decisions to judicial or, at least, constitutional control.” The OHR has requested that the Venice Commission pursue consideration of issues related to the functioning of Annex 7 after the end of the transitional period (end of 2000), in cooperation with the CRPC, and the Venice Commission has agreed to do so.

Action Plan

The OHR will continue to follow the work of the CRPC, and will work with the Venice Commission and the CRPC to determine what, if any, juridical or constitutional control should exist over the decisions of the CRPC following the end of the transitional period.

C. Regular Courts

1. Bosnia and Herzegovina

The Constitution of BH makes no provision for a court at the BH State level other than the BH Constitutional Court. Annex 6 to the GFAP provides for the establishment of an additional quasi-judicial body at the BH State level in the form of the Human Rights Chamber.

The Venice Commission has found that while the lack of a supreme judicial institution with general jurisdiction at the BiH level is not inconsistent with the constitutional system of BH, the Constitution empowers the State of BH to establish specific state-level courts in response to established constitutional needs.

The importance of creating a state level judiciary in accord with the opinion of the Venice Commission was explicitly recognized in the Madrid PIC:

“...the establishment of necessary structures at BiH State and Entity levels to fulfill the requirements of the respective Constitutions, including the creation, in accordance with the opinion of the Venice Commission, of judicial institutions at the State level, whose creation meets an established constitutional need, to deal with criminal offenses perpetrated by BiH public officials in the course of their duties, and with administrative and electoral matters.”

The Venice Commission identified three separate special courts that the State of BH is constitutionally required to set up.

First, the Commission called for a **permanent election jurisdiction** which would issue final decisions on all kinds of electoral disputes at the State, entity and cantonal level (subject to review of constitutional issues by the BH Constitutional Court)..

Second, the Commission reiterated the necessity of a **BH administrative court** which would deal with all aspects of disputes arising from any act or omission of BH administrative authorities, insofar as they constituted a criminal penalty or immediately affected any individual’s personal or economic rights (a definition derived from ECHR Article 6 jurisprudence). According to the Commission, the jurisdiction of such a court could go as far as some administrative disputes which did not raise these ECHR Article 6 issues.

Third, the Commission called for a **high criminal court** to deal with offences provided for in criminal legislation which, when committed by persons appointed to government or political office at the State level, cannot be tried by Entity courts.

Action Plan

OHR will urge the relevant political actors and authorities to immediately take the necessary steps to establish judicial institutions at the BH level where so required by the Constitution. The Venice Commission is currently examining the legal and practical modalities of these proposals. Legislation creating a state level judiciary will, after completion, be submitted to the BiH government for consideration. The judiciary at the BiH State level should be operational in the course of the year 2000.

2. Federation of Bosnia and Herzegovina_

The Federation consists of cantons, each with a certain degree of constitutional autonomy, making for a complicated judicial structure. The judiciary is split between the Federation (“federal”) level and the cantons. According to the Federation Constitution there are three

courts on the federal level. These are the Federation Constitutional Court, the Federation Supreme Court and the Human Rights Court, discussed above. All other courts, including virtually all first instance jurisdictions, are found at the cantonal level.⁴

In its current form, the judicial system of the Federation of BH continues to reflect ethnic divisions, creating problems of unequal access. With regard to criminal law matters, the judiciary in each of the Croat dominated Cantons has been established as a virtually autonomous judicial system with almost no possibility of appeal to the Federation Supreme Court. The Cantonal Courts of those Cantons serve as final instance in most criminal matters. The judiciary in the five Bosniak dominated Cantons and the two Cantons under special regimes, on the other hand, allow appeals to the Federation Supreme Court in cases involving criminal penalties exceeding ten and fifteen years of punishment, respectively. This imbalance needs to be addressed as a matter of urgency.

2.1. Federation Supreme Court

The Federation Supreme Court, established under Chapter IV.C(4), Article 14 of the Federation Constitution, is situated in Sarajevo. The Court must have a minimum of nine judges and presently 19 judges are sitting. There are no lay judges on the Supreme Court, which is the highest court in the regular court system, and the final court of appeals.⁵ It has competence to deal with issues regarding the constitution, laws and regulations of the Federation. It can also deal with other legal matters as provided in Federation legislation, with exception of anything that falls under the exclusive jurisdiction of the Federation Constitutional Court.⁶ The Supreme Court may also have first instance jurisdiction.⁷ Decisions by the Supreme Court are final and no further appeal is allowed,⁸ although constitutional issues falling under the BiH Constitution can always be appealed to the BiH Constitutional Court⁹.

The Federation Constitution did not create any trial or first instance courts in which trials of crimes which are within the exclusive competence of the Federation can be tried. Under the Constitution such crimes include terrorism, organized crime, unauthorized drug dealing, and inter-cantonal crime. The definitions of organized crime and inter-cantonal crimes, in particular, potentially include a wide variety of criminal acts.

An initial problem is the lack of a first instance court in which to try such cases. The Federation Constitutional Court has held that responsibility for these crimes cannot be delegated to the cantons. Since the Federation Constitution does not create any federal first instance courts, first instance jurisdiction must be created in the existing Federation court structure (barring a constitutional amendment). The Federation Constitution envisioned original jurisdiction in the Supreme Court in Chapter IV.C, Article 15(2) which provides that:

The Supreme Court shall also have such original jurisdiction as is provided by

⁴ According to the Constitution of the Federation, the federal level has exclusive competence for some areas of crime which means that there is a constitutional need to establish federal first instance courts. See [Constitution of the Federation of Bosnia and Herzegovina, Article IV.C.15\(2\) \[chapter on this\]](#)

⁵ Constitutions of Cantons 2, 8, 10 do not recognize the jurisdiction of the Supreme Court

⁶ FBH Constitution, Article IV.C.4.15

⁷ See [chapter on strengthening of the Federal pros. and establishment of a federal first instance court]

⁸ FBH Constitution, Art IV. C.4.16

⁹ BiH Constitution Art VI. 3 b.

Federation legislation.

Article 17 of Chapter IV.C. further defines the Supreme Court's original jurisdiction:

When the Court is exercising original jurisdiction pursuant to Article 15(2) it shall have, in addition to any powers specifically provided by the legislation pursuant to which it is acting, the same powers that other courts of original jurisdiction have pursuant to the laws referred to in Article 3(1) of this Sub-Chapter.

At the current time there is no "Federation legislation" which provides for original jurisdiction at the Federation Supreme Court. The OHR/OSCE proposal to enhance the office of the Federation Prosecutor includes a proposal to create an original jurisdiction department in the Supreme Court.

In accordance with the Venice Commission's Opinion on the competence of the Federation of BH in criminal law matters and with the Constitution of the Federation of BH, it is necessary for the Federation Government to enact legislation (a Federal Framework Law on Courts) to determine such rules of procedure as are necessary to ensure uniformity of proceedings before courts in the Federation. OHR will initiate an initiative with the Federation Government to ensure that the citizens in all Cantons have equal access to the Federation Supreme Court and that the Federation Supreme Court is the final instance for decisions of the Cantonal courts of all Cantons. The Supreme Court must be the guarantor of uniform application of law and human rights standards in all parts of the Federation. Accordingly, the Laws on Courts of the Cantons in question must be amended, where they are inconsistent in this respect.

2.2 Cantonal Courts

The cantonal courts are the highest courts of the cantons, and have appellate jurisdiction over the courts of the municipalities in the respective cantons. In addition they have first instance jurisdiction over matters which do not fall within the competence of the municipal courts and as provided in legislation. Depending on the canton, this situation varies. In the Croat dominated cantons¹⁰ the cantonal courts have little or no first-instance jurisdiction over criminal law matters and are only courts of appeal for such cases. In some of the other cantons the rule is that the cantonal courts have first-instance jurisdiction in criminal law matters subject to a minimum imprisonment of 10 years, while for other cantons the minimum imprisonment requirement is 15 years. With exception of the Croat dominated cantons, all cantonal court decisions can be appealed to the Federation Supreme Court. Specific constitutional issues can be brought to the BiH Constitutional Court¹¹

The eleven courts are situated in Bihac for Canton 1 (presently 12 judges / should be 15 judges according to law), Odzak for Canton 2 (6/5), Tuzla for Canton 3 (27/30), Zenica for Canton 4 (19/22), Gorazde for Canton 5 (4/8), Travnik for Canton 6 (10/12), East Mostar for Bosniac part of Canton 7 (9/?), West Mostar for Croat part of Canton 7 (7/10), Siroki Brijeg for Canton 8 (5/6), Sarajevo for Canton 9 (34/?) and in Livno for Canton 10 (4/5).

On 3 August 1998, the High Representative decided, after more than nine months of intensive negotiations and following a Venice Commission opinion, to enact the Law on Courts of the

¹⁰ Cantons 2, 8 and 10

¹¹ See footnote 9

Herzegovina-Neretva Canton and the Law on the Court of the Central Zone of the City of Mostar, and urged the relevant authorities in the Canton to fully implement the laws by no later than 15 November 1998. The laws require, *inter alia*, the establishment of seven courts in the City of Mostar, establishment of the Cantonal Court's first instance criminal jurisdiction for crimes punishable with fifteen years or more imprisonment and the staffing of all courts in the Canton according to the ethnic proportions in the 1991 census.

Nevertheless, political obstruction has prevailed and the Herzegovina-Neretva Canton remains the only Canton in the Federation which has not yet established a functioning judiciary in accordance with the provisions of the Federation and Cantonal Constitutions.

Progress has been made in the establishment of the Cantonal Court. A list of 18 proposed Cantonal Court judges has been agreed upon and presented to the Cantonal Assembly for approval. Progress in the establishment of the Municipal Courts can only be expected after the new Cantonal Court has been constituted as the President of this Court will appoint the Municipal judges. This can be expected soon. However the main difficulty lies in the establishment of the seven Mostar courts (one each for the six Mostar Municipalities, and one for the Central Zone). At this stage it is very unlikely that these courts can be established, as neither the buildings, the finances, nor judges and staff are available.

In a further attempt to find a solution, a meeting was held with the Presidents of the two Basic and High Courts currently operating in Mostar. The four Presidents were unanimously of the opinion that the two existing Basic Courts in Mostar should continue to operate for a transitional period of time to guarantee unbroken exercise of the right of access to the courts. A new (DATE) Decision of the High Representative on courts in the Herzegovina-Neretva Canton is meant to meet this need while at the same time respecting the proportional representation clause based on the 1991 census, until a permanent solution is found. Furthermore, this decision sets deadlines for the establishment of the Cantonal Court, all Municipal Courts except the six in the City of Mostar, and the Court in the Central Zone of the City of Mostar.

With regard to the establishment of a judicial system in the Central Zone of the City of Mostar, the following institutions will have to be established:

Depending on how much detail we want, the below bullets could perhaps be shortened or cut.

- Central Zone Court, which was envisaged by the Law on Court for the Central Zone, imposed by a HR Decision on August 3, 1998. This law has not yet been implemented. A deadline of November 1, 1999 is ordered in the Decision on Law on Courts of the H-N Canton.
- Misdemeanor Court. The Law on Misdemeanors of the Herzegovina-Neretva Canton, which came into force on March 3, 1999, requests that a Law on Municipal Misdemeanor's Courts must be adopted not later than June 2, 1999. This law does not exist yet. Furthermore, a Law on Misdemeanor's Court for the Central Zone of the City of Mostar must also be adopted. At this stage we must wait until the adoption of the Law on Municipal Misdemeanor's Court in order to ensure that the Misdemeanor Court for the Central Zone is in conformity. Therefore, we must be prepared for a further imposed law at a later stage.
- Public Attorney's Office. According to the Cantonal Law on Public Attorney's Office it is required from the units of local self-government to establish also offices of Public Attorney. At this point, it is advisable to wait for the units of local self-government (the City of Mostar and the 14 Municipalities) to establish their Public Attorney's Offices.

This section really belongs in the part of the JRS dealing with Prosecutors:

Public Prosecutor's Office. In accordance with the Law on Prosecution of the H-N Canton, a Law on Prosecution for the Central Zone has to be passed. After numerous meetings with the Ministry of Justice it became clear that the Croat Deputy Minister refuses his cooperation on this issue. However, both sides stated that they would respect a HR Decision on this issue. With this Decision we aim to achieve the establishment of the Prosecutor's Office for the territory of the Central Zone of the City of Mostar. In order to ensure a harmonized legal system throughout the Herzegovina-Neretva Canton, this Decision envisages that unless not otherwise provided by this law, all provisions of the *Law on Prosecution of the Herzegovina-Neretva Canton* which are applicable to the Municipal Prosecutor's Offices shall apply equally to the Prosecutor's Office for the territory of the Central Zone. Furthermore, the national structure of the Prosecutor's Office for the territory of the Central Zone shall reflect the overall national structure of the population in the entire City of Mostar, based on the results of the 1991 census.

Finally, the legal tradition of former Yugoslavia includes lay judges in addition to legally trained judges. The Federation has kept this tradition and lay judges comprise part of the court in some first instance-courts. The role of the lay judges is to represent the citizens and bring a common sense perspective to the proceedings as non-lawyers. While theoretically lay judges can participate in the panel or tribunal equally with the legally trained regular judge, practical experience has shown that they are rarely active or constructive participants. Draft legislation that speaks to this issue continues the use of lay judges but it is unclear whether or for how long this tradition will remain in place.

Action Plan

Needs work - I've left this as it was for the time being.

Due to political controversy over the number of judges for the Cantonal Court and the prosecutor for the Central Zone of the City of Mostar, only little progress has been made so far in actually implementing the decision. The OHR considers it as one of its foremost priorities to ensure full implementation of the High Representative's decision and the establishment of a functioning joint judiciary in this Canton, replacing the coexistence of two different legal systems in the Bosniak and in the Croat dominated areas of the Canton. Herzegovina-Neretva Canton is the only Canton left in the Federation without the judiciary yet established.

2.3 Municipal Courts

The municipal courts are the regular first instance courts of the cantons. They have first instance jurisdiction over all criminal and civil matters, except where first-instance jurisdiction is assigned to another court by the Federation or cantonal constitutions or by any other law of the Federation or the cantons¹². The competence of each municipal court is established in the Cantonal laws on courts.

In cantons 2, 8 and 10 (Croat cantons) the municipal courts are the first instance courts for all crimes and the cantonal courts are only courts of appeal. According to the constitution of these cantons, decisions of cantonal courts are final and binding, thereby depriving defendants of an appeal to the Federation Supreme Court.¹³ This limitation on the right of appeal is in violation of the European Convention on Human Right and urgently needs to be rectified.

¹² FBH Constitution, Chapter IV, Article 7(1)

¹³ See [chapter \[?\] for example, Constitution of Zenica-Doboj Canton, Article 60](#)

In other cantons the municipal courts have first instance jurisdiction for crimes which carry sentences of less than ten to fifteen years, depending on the canton. There are 49 municipal courts at present.¹⁴ In addition, there are 74 minor offense courts in the Federation, with seven separate Appeal Courts for Minor Offenses in cantons 1, 3, 4, 6, 7 and 9. In cantons 2, 8, 5 and 10, appeals from minor offense courts can be made to the cantonal court.

All municipal court decisions can be appealed to the relevant cantonal court. Each of the 49 municipal courts serve one or more municipalities. The number of judges in each court ranges between 2 and 29.

Action Plan

CoE will be encouraged to continue its research on streamlining internal municipal court rules within the cantons. Further research will be required to determine whether additional streamlining of criminal and civil procedure codes is feasible.

2.5 Minor Offenses Courts System

Minor Offenses Courts exist based on legislation at the Entity and Cantonal level. Minor offenses are distinct from crimes. However, a report by JSAP concludes that police have retained discretion whether to prosecute acts as crimes or minor offenses. IPTF has also reported on instances where police have lacked the requisite knowledge necessary to determine the difference between the two. The result is inconsistent application of criminal statutes. These concerns exist in both entities and the minor offenses system is found on several levels in the Federation. The cantonal structure has the minor offenses court as a first instance court. Decisions of these courts can be appealed, depending on the canton, to a municipal court¹⁵, a cantonal court¹⁶ or to a special courts of appeal for minor offences¹⁷.

Action Plan

These courts should be done away with and their competence should be transferred in full to the next highest court in the area of their respective former jurisdictions.

2.6. Judicial Police

The establishment of a judicial police in the Federation of BH is a mechanism to ensure the functioning and security of court proceedings and is under the control of the President of the Supreme Court. According to the Federation Constitution, the judicial police shall assist each Federation Court *in securing information, in ensuring the presence of witnesses and the transport of accused persons, in maintaining the decorum of courtrooms and the security of court premises, and in carrying out court orders.* Based on this provision the Federation adopted the Law on the Judicial Police in October 1996. Additional Rules and Regulations have been promulgated by the President of the Federation Supreme Court

¹⁴ Information as per 2 March 1999 from JSAP

¹⁵ Canton 5

¹⁶ Cantons 2, 8 and 10 (Croat dominated cantons)

¹⁷ Cantons 1, 3, 4, 6, 7 and 9

The concept of judicial police is not native to the former Yugoslavia, but resulted from the Washington Agreement of March 1994. Eleven Judicial Police Departments are contemplated, one at the Federation level and one in each canton. The Judicial Police are operational at the Federation level and at the cantonal level in Tuzla, Sarajevo and at the Supreme Court. In the near future, they are expected to be operational in Bihac, Livno, Central Bosnia (Canton 6).

The international community's support for the current structure of the judicial police, however, is limited. The Law on Judicial Police authorizes assistance to all courts at the Federation and cantonal levels as well as to the Ombudsman Office and the Federation Prosecutor, at the request of any of those officials of those bodies. The Judicial Police, when assisting courts, have the authority to secure information, apprehend and compel the attendance of witnesses and accused persons, deliver convicted persons to corrections institutions, maintain order in the courtroom, provide security for judges, other court officials and the court buildings, and enforce other court orders. The Law also authorizes the Judicial Police to conduct searches and seizures and gives the President of the Supreme Court the ability to enter into an agreement to provide Judicial police to assist the Federation Prosecutor, even though the Federation Police currently have the same mandate. Moreover, the judicial police will have the capacity to carry weapons.

While many of the duties of the Judicial Police are directly in support of judicial functions, the ability to "secure information" and conduct searches and seizures duplicates the mandate of existing police at the canton and Federation levels. In a country which has traditionally had a heavy police presence and has taken significant steps to reduce those numbers, the creation of a police force with competences which overlap with existing police forces is a step in the wrong direction.

Still to be determined is the need for the Judicial Police to expand its security responsibilities. For example, JSAP has reported that no viable witness protection program exists within BiH and that there is currently no capacity for 24 hour, 7 day per week protection for judges and prosecutors engaged in controversial proceedings.

As a technical tool for the judiciary and under the responsibility of the President of the Supreme Court, the judicial police can be a useful mechanism which could further diminish the influence and visibility of ordinary police at court buildings and proceedings.

Action Plan

The role of the Federation judicial police should be limited to providing security for courthouses and court proceedings.

3. Republika Srpska

The judiciary in RS is divided into Basic Courts, District Courts, the RS Supreme Court and the Constitutional Court. The division of material competences is similar to the one in the Federation. The basic framework is established by the RS Law on Judicial Organization (RS Official Gazette 22/96).

The RS judiciary is almost entirely composed of Bosnian Serbs (around 97% in total) and the presence of minorities is negligible with the exception of Brcko, where the supervisor has established a multiethnic administration, judiciary, and police.

The vacancy rate of the RS judiciary is up to 33%, which could allow an eventual reintroduction of minorities

3.1 Supreme Court

The Supreme Court is competent to decide on regular legal remedies in respect of the decisions of district courts, on extraordinary legal remedies in respect of valid decisions of courts, appeals against second instance decisions of the Supreme Military Court on appeals in third instance in respect of second instance courts in the Republic, on legal remedies in respect of decision of the Supreme Court Council, on the legality of final administrative acts by the organs of the Republic, on determination in principle of legal attitudes and legal opinions, settlement of conflicts of jurisdiction between regular courts, on transfers of jurisdiction and other issues prescribed by law.

The Supreme Court is currently staffed with 12 judges—all of them Serbs—instead of the 15 present in 1991. There is a 20% vacancy rate.

3.2 District Courts

There are five district courts, one each in Banja Luka, Bjielina, Doboj, Trebinje and Lukavica/Srpsko Sarajevo.

The district courts are competent to try second instance appeals against decisions taken by the basic courts, to try in first instance criminal cases for which the law has foreseen punishment of imprisonment of fifteen years or heavier, investigation, copyright cases, public media cases, decisions on legality of final administrative acts, decide on acknowledgment and execution of foreign court decisions, decide on requests of foreign states for extradition, solve conflicts of jurisdiction among basic courts and to decide on other matters determined by law.

There are 46 district court judges. In 1991 there were 98. Currently 59% of the available positions are vacant. Only one of the current judges is not Serb by nationality.

3.3 Basic Courts

There are twenty six basic courts sited in Banja Luka, Bjielina, Brcko, Doboj, Visegrad, Vlasenica, Gradiska, Derventa, Zvornik, Kotor Varos, Kozarska Dubica, Lopare, Modrica, Mrkonjic Grad, Nevesinje, Novi Grad, Prijedor, Prnjavor, Rogatica, Lukavica/Srpsko Sarajevo, Sokolac, Srbac, Teslic, Trebinje, Srbinje and Srebrenica.

Basic courts are competent to try first instance criminal cases punishable with less than fifteen years, civil suits in the first instance (civil disputes and disturbance of property) and labour law cases in first instance.

Currently there are 211 judges employed, only 9 of them are not Bosnian Serbs: five Bosniak Muslims, two Croats, one Ukranian and one Italian (4.6% of the total). In 1991 there were 283. There is a 26% vacancy rate.

3.4 Minor Offense Courts

There are 42 Courts for Minor Offenses in RS. The 5 District Courts act as appellate bodies for

those courts. Other concerns related to Minor Offenses Courts in the RS mirror those encountered in the Federation. See also Paragraph 2.5 above and the Action Plan at Paragraph 2.5.1.

Action Plan

These courts should be done away with and their competence should be transferred in full to the next highest court in the area of their respective former jurisdictions.

3.5 Judicial Police

The establishment of a Republika Srpska Judicial Police in the near future is a priority. However, the structure of such a force must be consistent with the structure of the judicial police in the Federation, and the mandate of both police forces should be limited to essential courthouse security tasks which do not overlap with the mandates of the regular police forces.

D. Judges

1. Judicial Selection/Discipline/Dismissal

The selection and appointment of judges based on merit and the establishment of a system which allows for their removal only in cases where sufficient cause exists is one of the cornerstones of an independent judiciary. The Federation Constitution requires that all judicial power in the Federation be exercised independently and autonomously.²⁶ The European Convention on Human Rights²⁷ in Article 6, establishes the right a fair hearing before an independent and impartial tribunal.

The independence and professionalism of the judiciary is perhaps the most important of all reforms in establishing the rule of law. Strong laws, professional police and diligent prosecutors are all for naught if the judiciary remains corrupt, incompetent, biased or influenced by the executive. In the eyes of the public, nothing undermines the foundation of the rule of law quicker than a judiciary which fails to uphold the very laws and legal principals it is created to protect. Further, once independent and professional judicial decisions are made, the government structure must be in place to ensure implementation of the decisions.

Recent judicial selection in BiH has, in many instances, been the product of political patronage. This has resulted in the appointment of some individuals with little regard to qualifications and whose primary loyalty is to the party which secured their appointment.

The Madrid PIC called for:

- the adoption , by 30 June 1999, of legislation to achieve an independent and impartial judiciary, focusing on judicial and prosecutorial appointments, adequate salaries and objective standards for the appointment judges and prosecutors, consistent with those of European practice, and the promotion of a multi-ethnic judiciary throughout BiH;

²⁶ Fed Constitution, Art. IV.C.1.4(1)

²⁷ Adopted in the Federation Constitution in Article II.A.1

- adoption of judicial and prosecutorial codes of ethics as well as the establishment of a disciplinary and dismissal system based on these standards by 30 June 1999.

1.1 Bosnia and Herzegovina

As noted, there is no judicial structure at the BiH level other than the Constitutional Court at this point in time. There is an identified need to develop additional courts and as they become established, the BiH Parliament must adopt a judicial selection system which is based upon merit and qualifications under criteria similar to the that under consideration in the Federation and the Republika Srpska.

Action Plan

When the package of laws to create the BiH level judiciary is prepared, it is essential to ensure that provisions are included on judicial selection.

1.2 Federation of Bosnia and Herzegovina

Efforts have been underway in the Federation to develop a new law for the appointment and dismissal of judges. Initially the Association of Federation Judges developed a draft law, which was then reviewed and revised by OHR. In February the draft law was submitted for review by a panel of Council of Europe experts, along with a Republika Srpska draft law on judicial selection. Following a meeting chaired by the Council of Europe in Sarajevo on 26 February 1999, a working group was created by the Federation minister of Justice to develop a final working draft on judicial selection.

The draft is a combination of the OHR proposal and the RS proposal, which was adopted from the Slovenian law on judicial selection. The Slovenian law is comprehensive in that it incorporates salary provision, and protection of professional status. The Federation draft was presented to a meeting of cantonal Ministers of Justice and judicial officials in Neum on 9, 10 April for discussion. The proposal was extended to include prosecutors. The working group met following the Neum meeting and the proposal has been presented to the Council of Europe for review and to the Federation Government.

Action Plan

OHR will lead the international community in providing direct political advice and assistance as the draft law is considered by the Federation Parliament to help ensure passage. Monitoring of the implementation of the law shall be required immediately upon passage.

1.3 Republika Srpska

The efforts to reform judicial selection in the Republika Srpska took a different path than did the efforts in the Federation. In December of 1997 a Proposal of the Law on Changes and Amendments of the Law on Regular Courts was placed on the agenda of the RS National Assembly. This proposed law only addressed the method of judicial selection in the RS and OHR requested that it be removed from the agenda and that a RS working group be established

to develop a comprehensive law addressing the appointment and removal of judges as well as their salaries and working conditions. The government of the RS removed the proposed law from the agenda and developed a draft law based on the Slovenian law on judicial selection. The Council of Europe held a session in Banja Luka on the proposed law and following submission of comments from CoE and OHR, the proposed law was revised by the RS working group. Due to the political situation in the RS the revised law has been delayed but is now being readied for final review by OHR and will then be forwarded to the CoE for further review.. Following that review and any necessary revisions, the law will be ready for submission to the National Assembly.

Action Plan

OHR will lead the international community in providing direct political advice and assistance as the draft law is considered by the National Assembly to help ensure passage. Monitoring of the implementation of the law shall be required immediately upon passage.

2. Judicial Salaries

2.1 Bosnia and Herzegovina

Constitutional Court Judges earn 1100 KM per month and the President of the Constitutional Court earns 1281 KM per month.

2.2 Federation of Bosnia and Herzegovina

Federation judges are currently paid various amounts based upon their location. The salaries range from 800 KM to 1500 KM per month, in basic step with prosecutor salaries. The draft law on judicial and prosecutor selection which is currently pending would establish a uniform pay level for judges and prosecutors.

2.3 Republika Srpska

In the RS judicial and prosecutor salaries are based on calculation using the acknowledged “Lowest Labor Price” (LLP) multiplied by a pre-set coefficient to determine base salary. For instance, the calculation for the President of the Constitutional or Supreme Court is $60 \text{ KM (LLP)} \times 7.7 = 460 \text{ KM/month}$. For other members of those courts, the salary is $60 \text{ KM (LLP)} \times 7.2 = 432 \text{ KM/month}$. Inspectors on the RS police force earn more than most judges and prosecutors.

Action Plan

Salary increased are included in each entities draft laws covering judicial selection issues. OHR and the international community must apply significant political pressure to ensure that the two entities recognize and meet the financial responsibilities necessary to establish and maintain an independent judiciary.

3. Professional Associations/Codes of Ethics

Professional associations exist at the entity level and there is a separate Association for Croat Judges and Prosecutors within the Federation. Discussions regarding a potential single Code of Ethics for Judges for all of BiH have been undertaken under the sponsorship of OHR. While a single code is not feasible until a single body is created to represent all judges within Bosnia and Herzegovina, discussions with representative organizations in both entities has resulted in each body adopting the same code of ethics.

3.1 Bosnia and Herzegovina

While no professional association for judges or prosecutors currently exists at the BiH level, as the BiH judiciary is developed the creation of such an association become necessary for the state level judges and prosecutors. Currently there is discussion of creating some type of umbrella organization for the entity associations which would allow for representation of BiH at international judicial bodies.

3.2 Federation of Bosnia and Herzegovina

Separate associations exist for Judges and Prosecutors in the Federation. Codes of Ethics were recently adopted by both associations which provide a comprehensive set of professional and ethical standards of judges and prosecutors.

3.3 Republika Srpska

A single Association for Judges and Prosecutors exists in the RS. That Association, like its two comparable groups in the Federation recently adopted a code of ethics. This code is identical to the one adopted by the Associations in the Federation.

Action Plan

The international community will monitor application of the new codes of ethics and ensure that they and other standards for behavior for judges and prosecutors are effectively used.

4. Judicial Training

An essential cornerstone in establishing an impartial judiciary is the establishment of a professional educational system which can provide a coordinated approach to judicial training for newly appointed judges and continuing education for sitting jurists. Such a system can ensure that accepted international standards are provided to newly appointed judges. Additionally, such a system can assist in keeping judges up to date in changes and developments in the existing body of law.

4.1 Bosnia and Herzegovina

With no structure for regular courts established at the BiH level, it does not appear reasonable to explore the development of a formal training system at this time. As the State level structure is developed, it would be logical to utilize the judicial training opportunities offered at the entity level.

4.2 Federation of Bosnia and Herzegovina

The Council of Europe, OSCE and ABA/CEELI have proposed the establishment of a judicial training center initially in the Federation and later in the RS. A draft law for a Judicial

Training Center in the Federation has been completed and has received comments from Council of Europe experts.

Efforts are underway to identify a physical location for a Center in Sarajevo. Experienced judges and former judges are currently being reviewed for appointment as interim administrator of the center to establish the statutes and develop the procedures, and establish an operational center.

4.3 Republika Srpska

Efforts in the R/S have been slowed by the current political situation, however a parallel institution to the Federation center is planned in Bnaja Luka. A joint board of control would be established to jointly administer the two centers in their first years of existence to ensure that the structure, requirements and curricula are consistent.

Action Plan

ABA/CEELI, OSCE and the Council of Europe will continue to develop the Federation proposal. The group will continue to review potential candidates for the interim administrative position. The intention remains to have the Federation Judicial Training Center operational by the end of 1999.

II. PROSECUTORS

Following the creation of the Federation and the RS, both Entities adopted versions of the former Yugoslavian Criminal Procedure Code. In these codes the role of the public prosecutor was secondary to both the role of the investigating judge and the police. The dominant institution in the criminal justice system was clearly the police with few practical controls on their powers. The prosecutor was often relegated to little more than a conduit for transmitting criminal charges to the investigating judge, and as a result, they had little effective as a check and balance on the powers of the police.

A principle accepted throughout most of Europe is that the public prosecutor not only ensures justice but also procedural fairness, which includes ensuring that the police respect the rights of individuals who are questioned, searched or detained. That was not the role of the prosecutor under the former Yugoslavian Criminal Procedure Codes. Some changes were made in the revised Federation Criminal Procedure Code to ensure that the prosecutor becomes an effective tool in ensuring that individual rights are respected and to ensure the lawfulness of police investigations. This authority needs to be addressed in the Phase One revisions to the Criminal Procedure Code in the Republika Srpska currently underway.

A. Bosnia and Herzegovina

There are currently no prosecutors at the BiH level, however a package of laws is being developed to establish a BiH judiciary which will include prosecutors.

B. Federation of Bosnia and Herzegovina

1. Federation Prosecutor

The Federation Prosecutor is not a constitutionally created office and its duties and responsibilities are established by the Law on the Federal Prosecutor's Office.²⁸ The Office is an autonomous state body which, although not directly supervised by the Ministry of Justice, the Minister must propose candidates for the position to the Federation President and can initiate the procedure to dismiss the prosecutor.²⁹

The Federation Prosecutor's Office currently has a staff of four deputies and two assistants attorneys and six support staff. Their technical support equipment is limited and they employ no investigators, nor do they have the legislative authority to do so. The compensation of the Federation Prosecutor is established by Federation law, however, since the salary of cantonal prosecutors is established by each canton, some canton prosecutors receive a higher salary than the Federation prosecutor.

The Federation Prosecutor is authorized to prosecute persons who commit criminal acts and economic violations as defined by Federal legislation.³⁰ The prosecutor can proceed in the Federation Supreme Court and other courts of the Federation, which at this point are limited to the Constitutional Court and the Human Rights Court.³¹ The Federation Prosecutor is also authorized, however, to prosecute cases in cantonal courts under the provisions of Article 5 of the Law on the Federal Prosecutor:

The Federal Prosecutor may give binding instructions to the Cantonal prosecutor and undertake criminal prosecution in matters in which the Federation determines criminal offenses and for which the Prosecutors' Offices in the Cantons are competent. The Federal prosecutor may give binding instructions to the cantonal prosecutor and undertake prosecutions also in matters which relate to economic offenses defined by federal legislation and for the implementation of which the federal bodies are responsible.

One of the weak links in the Federation criminal justice system has been identified as the unwillingness or inability of local prosecutors to pursue cases involving return related violence or where there are other political or ethnic pressures to take or not take certain action. This possibility appears to have been anticipated by the Federation in the adoption of Article 5 which grants the Federation Prosecutor the authority to direct (through a mandatory instruction) the cantonal prosecutor to take a certain action. Although not readily apparent from the text of the Article, the traditional interpretation of this provision is that if the cantonal prosecutor does not take the directed action, the Federation prosecutor can assume the responsibilities of the cantonal prosecutor and proceed with the prosecution in cantonal court.

This ability is extremely important as often local pressures will prevent cantonal prosecutors from taking appropriate action in sensitive cases. Unfortunately, due to a lack of resources and political will, the Federation Prosecutor has not exercised this authority in appropriate cases.

²⁸ There is no reference to the prosecution function in the Federation Constitution, leaving it debatable whether the prosecutors are part of the judicial branch or executive branch.

²⁹ Article 1, 22, 26, Law on the Federal Prosecutor's Office

³⁰ Article 11, Law on the Federal Prosecutor's Office. The Prosecutor is also authorized to submit legal means and undertake measures defined in Law in order to protect legality and exercises other duties defined in Federal Law.

³¹ Article IV.C.1.1, Federation Constitution. The Human Rights Court has never become operational.

The Federation Constitution established four crimes as being within the exclusive competence of the Federation.³² In May 1998 the Federation Constitutional Court ruled that the provisions in the Law on Internal Affairs which attempted to delegate the authority to investigate these four crimes to the cantons was unconstitutional as those competencies were exclusive to the Federation and could not be exercised by the cantons.³³ This Constitutional language, and the Constitutional Court decision, requires that these Federation level crimes be investigated and prosecuted at the Federation level.

Unfortunately the Federation Constitution failed to create a trial court in which first instance criminal cases can be tried and the authority of the Federation Prosecutor is unclear as to whether that office has the authority to prosecute Federation level crimes. This presents a serious and immediate problem since the scope of “crimes” which can be considered as exclusively within the competence of the Federation is significant. Inter-cantonal crimes, for instance, are defined in the Law on Internal Affairs as crimes *where the perpetrator and victim reside in different cantons or where the criminal act started in the territory of one canton and finished in another canton or where there were negative consequences in another canton.*³⁴ Given the relatively small geographic area of the Federation, many crimes will qualify as “inter-cantonal” under this definition, with the very real possibility of having a majority of crimes committed in the Federation designated as being within the exclusive competence of the Federation while the majority of the judicial and prosecution assets are at the cantonal level.

These issues were recognized in June 1998 when the Luxembourg PIC called for a strengthening of the Federation Prosecutors Office and they were again emphasized at the Madrid PIC. In response OSCE and OHR developed a proposal to address these inadequacies. The proposal impacts not only the Federation Prosecutors Office but the Federation Supreme Court as well. The proposal calls for a new department to be created in the Supreme Court to hear first instance criminal cases, with appeals being heard by a different panel of the Court.³⁵ The authority for the Federation Prosecutor to directly prosecute first instance criminal cases in the Supreme Court is clarified and the Federation Criminal Procedure Code provisions relating to procedures for prosecuting criminal cases are made applicable to the Federation Prosecutor when prosecuting criminal cases before the Supreme Court. The Article 5 authority of the Prosecutor to issue mandatory instructions to cantonal prosecutors and to take over the prosecution of case where the cantonal prosecutor failed to properly respond is also clarified.

Action Plan

The Federation Prosecutor must have the clear authority to supervise the police investigation into Federation level crimes and to prosecute those crimes in the Federation Supreme Court. The authority of the prosecutor to issue mandatory instructions to cantonal prosecutors who are reluctant to pursue cantonal level cases must be clarified as well as the Prosecutor’s authority to take over the prosecution if they cantonal level prosecutor fails to comply with the instruction. The Federation Prosecutor’s Office must have a minimum of an additional five prosecutors and required support staff, as well as the necessary technical equipment and supplies.

³² Article III.1(e) of the Federation Constitution itemizes terrorism, inter-cantonal crime, unauthorized drug dealing and organized crime as within the exclusive competence of the Federation.

³³ Case No. S-87/98-1 "Delivery of Judgment No. U-13/97", issued 25 May 1998

³⁴ Law on Internal Affairs, Article 3

³⁵ See Section I.C.2.1 of this Strategy

All of these items are included in the current proposal developed by OSCE and OHR. The legislative changes have been presented to the government for introduction in the Parliament. Parliamentary consideration should take place July 1999. The additional prosecutors (funded by the Federation) should be hired by as soon as possible after passage of the new law and the additional technical equipment, supplies and vehicles also delivered according to that timetable. Specialized training will be provided for these new prosecutors. Under Phase II of the criminal law reform in the federation, a working group will be created on the role of the prosecutor, which will address changes to both the Federation level and cantonal level prosecutor's offices. (OHR, OSCE, CoE, DOJ/CEELI)

2. Cantonal and Municipal Prosecutors

None of the ten cantons in the Federation mention the office of cantonal prosecutor in their constitutions, although all reference the competence of the canton government to provide supervision over the investigation and criminal prosecutions related to the violation of cantonal laws.³⁶ The hiring process and salary provisions of the cantonal prosecutors are dependent on cantonal law and therefore vary from canton to canton. The salary of cantonal and municipal prosecutors ranges from 800 to 1500 KM per month. Because the salary of prosecutors in the Croat cantons is often higher than the salary of prosecutors in the Bosniak cantons,³⁷ efforts need to be undertaken to increase and equalize the salary levels of the cantonal level prosecutors.

The technical equipment needs of prosecutor offices varies from canton to canton but an introduction and/or upgrade of computer technology will greatly enhance the efficiency of prosecutors offices by development of case management systems. UNDP/CICP currently has a comprehensive project to provide computers, software and training for cantonal prosecutors and courts.

The Phase I revisions to the Federation Criminal Procedure Code provided the cantonal and municipal prosecutors with the authority to be involved in police investigations earlier in the process as well to as direct specific steps in the investigation. As noted the prosecutor is an effective tool to control the conduct and lawfulness of the police investigation.³⁸ The prosecutor is also better aware of the technical legal requirements necessary to establish a criminal offense and therefore needs to be able to intervene and direct the police investigation to determine the existence or non-existence of relevant facts.

While these initial revision are a step in the right direction, they only slightly strengthen the prosecutor's authority. Further study and consideration must be given to further enhancement of the role of the prosecutor. Any potential revisions, however, must be done in a manner which ensures that there is adequate oversight and control of the prosecutor and that the rights of the accused are fully protected. The Judicial Reform Coordination Group has created a Issue Group to study the Role of the Prosecutor" which will be comprised of both international and Federation experts to ensure that prosecutors have the necessary authority and tools to fulfill their responsibilities.

³⁶ There is no reference in the constitutions to the competency of the cantons to supervise the investigation and prosecution of crimes contained in the Federation Criminal Code, which is the main body of criminal laws applicable to the cantons.

³⁷ JSAP has researched this topic and determined the pay of prosecutors in the Posavina Canton (Canton 2) is unusually high at the 1500 KM range. (Need here some figures on salary levels re Croat and Bosniak cantons.)

³⁸ FedCPC, Articles 42(1)(2), 145(1); 146(1)(2); 148(1); 199(1).

As noted in the discussion on the Federation Prosecutor's office, local pressure on prosecutors often hamper or prevent prosecution of crimes for ethnic or political reasons. In time, as the prosecutorial selection process matures and as the independence of prosecutors from political influence is ensured, these instances will become less frequent. In the interim, however, it is essential that the Federation Prosecutor have the ability to direct the actions of cantonal prosecutors in specific cases, and, if the cantonal prosecutors fail to take the directed action, the Federation Prosecutor must be able to step in and take over the prosecution. At that point the Federation Prosecutor (or his deputy) assumes the powers of the cantonal prosecutor and prosecutes the case under the authority of the cantonal prosecutor.

Action Plan

Given the discrepancies between the cantons, an individual judicial reform action plan needs to be developed for each canton addressing both the needs of the prosecutors and the courts. A needs assessment is required which will be developed by OHR with the assistance and advice of JSAP. OHR will then identify the organizations and donors to implement the individual plans and develop a timetable. UNDP/CICP's analysis for the computer needs of the prosecutors office will provide a basis for the initial computerization effort. An Issue Group will be created to study the "Role of the Prosecutor" and recommend the necessary revisions to the criminal procedure codes.

C. Republika Srpska

1. Republic Prosecutor

The structure of public prosecution in the Republic Srpska is much less complicated than the structure in the Federation. In the RS there are no cantons and the prosecution function at all levels is under the control of the Republic Prosecutor. The authority and responsibilities of the RS prosecutors is contained in the Law on Public Prosecution.³⁹ All prosecutors are appointed by the National Assembly, and can be removed by the same body. There are three levels of prosecution in the RS: basic prosecutors; higher prosecutors and the Republic Prosecutor. There are 36 basic prosecutors, one for each basic court. There are 5 higher prosecutors, one for each high court. There is one Republic Prosecutor, who appears before the RS Supreme Court and who has responsibility for all public prosecutions in the RS.⁴⁰ Salaries for prosecutors range from 300-600 KM per month. Salaries have been paid only sporadically leading to increasing difficulty in recruiting and retaining staff.

The higher public prosecutors can take over the prosecution of a case from a lower prosecutor or authorize another lower prosecutor to take over the prosecution. Prosecutors in the RS suffer from the same lack of authority over the police investigation as did the Federation prosecutors. Currently the Phase I revisions to the RS criminal codes are being drafted, and the revisions enhancing the prosecutors authority in the early stages of the police investigation are contained in the initial redraft.

All of the prosecutor offices in the RS are in need of computerization and other technical enhancements. UNDP/CICP has completed a comprehensive plan to provide computer to prosecutors offices and courts in the RS. Salaries of prosecutors in the RS are lower than their

³⁹ Law on Public Prosecution, Official Gazette of RS, No. 6, May 20, 1993

⁴⁰ Law on Public Prosecution, Articles 22, 23,24,27.

colleagues in the Federation and this area needs immediate attention if qualified individuals are to be retained or recruited for these positions. The RS government also needs to properly fund the supplies and equipment for prosecutor's offices, all of which suffer from technical and material deficiencies.

Action Plan

The Republic Prosecutor's office needs are substantial. There are issues of legal authority as well as basic financial support. Computerization of the offices is essential to link and coordinate the work effort as well as provide the opportunity for research. Those structural issues regarding the prosecutor's ability to direct the activities of other law enforcement officials shall be addressed through Phase 1 and 2 of the RS Criminal Code revision. Funding will be sought through contact with donor countries and organizations.

D. Prosecutor Training

There is a significant need to provide and improve the training of prosecutors in both entities. Training on the European Convention on Human Rights is necessary as well as specialized training on issues such as corruption, organized crime, and the use of task forces to combat crime.

Action Plan

Current training has already begun under the auspices of ABA/CEELI, CoE and International Human Rights Law Group (IHRLLG). Additional training on specific areas and issues is needed.

III. DEFENSE ATTORNEYS

The pre-war Yugoslav Law on Criminal Procedure, which still is valid in Republika Srpska and is the basis of the reformed Federation Criminal Procedure Code, establishes the basic role of the defense attorney in the criminal justice procedure. It provides that the accused may have defense counsel throughout the entire course of criminal proceedings. In essence, only a member of the bar can be a defense counsel (henceforth, defense attorney implies membership of a bar association). There are exceptions, when an attorney in training, non-member of the bar who has passed the professional exam (bar exam) or a law graduate can replace a defense attorney.⁴¹ The formal requirement of membership in a recognized bar association calls for analysis of the several bar associations in BiH, also since bar associations traditionally provides defense attorneys with continuing training.

A. Bar Associations

1. Background

Before the war, each of the republics and autonomous provinces of former Yugoslavia had separate bar associations, joined in the Union of Bar Associations of Yugoslavia. The bar associations adopted their own statutes and other by-laws relevant to the functioning as

⁴¹ Yugoslav Law on Criminal Procedure, art. 67

constitutionally and legally established service in society. The Bar Association of Bosnia and Herzegovina continued its existence after BiH was recognized as an independent state in 1992, and has the basic legal framework in the 1989 Law on Legal Practice (SRBH)⁴², which still is valid in the Federation. Due to the political developments it eventually became synonymous with aspirations to keep BiH unified, as opposed to desires to create separate Serb and Croat entities in BiH.

Thus, the Bar Association of BiH was not recognized by authorities in Republika Srpska, and based on the RS constitution, an entity Law on Legal Practice was passed by the RS National Assembly in October 1992.⁴³ This required citizenship of RS for membership in the association. Similarly, the Croatian Defense Council in 1993 adopted a decree on Law on Legal Practice on the territory of the (then) Croatian Republic of Herzeg-Bosna. It determined that attorneys from the territory would be organized in the Bar Association of the Croatian Union of Herzeg-Bosna (sic), and that legal counseling as professional activity only could be exercised under conditions set out in the mentioned law and the decree. In reality this meant that three parallel bar associations came into existence: an RS bar association, a Croat bar association and the BiH bar association, which came to be identified as the (only) bar association for Bosniaks.

2. Current Situation

The same three bar associations are still in existence. Courts in Republika Srpska are reportedly still only recognizing defense attorneys that are members of the RS bar association.

Whether courts in the Federation recognize attorneys from RS that are not members of any of the bar associations based in the Federation is not known. **NEED INFO** Also unknown is whether all courts in Croat dominated cantons recognize attorneys that are not members of the Croat bar association, and if all courts in the Federation recognizes attorneys who are members only of the Croat bar association.

Still unresolved is the issue of whether a license to practice in one entity will entitle a lawyer to practice in the entire country. The Commission on Inter-Entity Legal Cooperation evidently proposed this in June 1998. This legal reform should be one of the recommendations of strategy. There is a proposed Federation Law on Legal Practice from 1997, but this project does not seem to have moved forward. A clear lack in this draft is that it proposes that the client only has right to free choice of attorney from the territory of the Federation. The draft law was heavily criticized in the Dayton v. Attorneys, in which the authors argue strongly for the BiH Bar Association.

Dayton established a Bosnia with two entities and two parallel criminal justice systems. It may well be that BiH must have two separate bar associations. It should, however, be a goal that means be established to ensure that membership of either of the bar associations has the potential for cross boundary practice.

B. Appointment and Funding of Defense Counsel

1. Bosnia and Herzegovina

⁴² SRBH Official Gazette No. 35/89

⁴³ RS Official Gazette 11/92, amended 12/93, 26/93, 1/94, 8/96.

When the BiH level judiciary is established, provisions must be included for the appointment and funding of defense counsel.

2. Federation of Bosnia and Herzegovina

It is necessary to differentiate between the right to have defense counsel, and the right to have the court appoint defense counsel (i.e. court appointed defense counsel). The importance of this is that the court becomes responsible for the cost of the defense (with possibility to obligate the sentenced person to reimburse the costs later). While the right to have defense counsel was extended in the reformed Criminal Procedure Code in the Federation, this was not necessarily accompanied by an obligation for the court to appoint someone to be defense counsel. For example, even though there is a right for a suspect to request appointment of defense counsel upon arrest, there seems to be no expressed corresponding obligation for the court (or any other authority) to appoint defense counsel for the suspect.⁴⁴ Not until 24 hours has passed, will defense counsel be appointed unless the suspect/accused already engaged defense counsel himself.⁴⁵

Mandatory defense, i.e. the competent court has an obligation to ensure that the accused has defense counsel in the criminal trial, is required in five cases: If the accused is deaf, mute or otherwise incapable of defending himself; if extended imprisonment (20-40 years) may be pronounced for the crime (mandatory defense counsel from the first examination); when the crime can lead to imprisonment of 10 years or more; if the accused is tried in absentia; if and when the accused has been assigned to pre-trial custody *for the whole course of pre-trial custody*. . In these cases the court must appoint a defense attorney for the accused if he fails to appoint one for himself, regardless of his capacity to pay for it himself. (Art 66). In addition to and separate from mandatory defense, the court has an obligation to appoint defense counsel if the accused does not have funds to pay for defense counsel when imprisonment for three years or more may be pronounced for the crime, or if the particular case is complex. (Art 67). In all these cases it seems that the court is initially responsible for paying the cost of defense counsel, with a possibility for the court to decide that the sentenced should reimburse all or part of the costs.

The accused always has right to appoint his own defense counsel if he is willing to assume responsibility for the cost, in which case the court appointed counsel shall be dismissed.

If there is a right and a need on objective grounds to have defense counsel, the court should have an obligation to appoint one. The suspect/accused would still have the right to freely choose defense counsel, however this right needs to be balanced against what it costs (e.g. a special attorney is excessively expensive or if the accused insists to change defense counsel repeatedly). The suspect or accused, if found guilty and being able to afford it, should be responsible for the cost to the extent possible. The question of who should pay is best determined by the court at end of the trial.

3. Republika Srpska

The present RS criminal procedure is the former Yugoslav code, and is under review for reform.

⁴⁴ FBH Criminal Procedure Code, art. 4 (3)

⁴⁵ Ibid Art 185 (3)

C. The Advocacy Role of Defense Attorneys in the Procedure

A widely recognized problem, reported by many of the international trial observers, is the rather passive role that defense attorneys often play in the trial. This appears to be a problem with both the prosecutors and the defense attorney. It is evidently linked to a criminal justice tradition revolving around active judges, both during the investigation - pre-trial phase - and during main trial. The goals of the criminal procedure reform requires active advocacy from the defense attorney during the whole criminal justice procedure.

Action Plan

An assessment of the future regulation of legal practice generally throughout Bosnia and Herzegovina is required. This assessment must include addressing which body or organization shall establish the criteria for admittance to legal practice in each entity. This assessment must also address the issue of reciprocity for those lawyers licensed to practice in one entity but wishing to practice in the other. Such an assessment must be carried out in the near future. ABA/CEELI will be contacted about the possibility of providing support on this issue.

OHR will monitor and assist in the development and adoption of necessary legislation. It will also be necessary to review the current rules in the existing criminal procedure codes on court appointed defense counsel; to review the procedural rules on the competency of the defense attorney in the criminal procedure; and to provide training to increase the ability of defense attorneys to assume a more active advocacy role in criminal procedures. A needs assessment regarding defense counsel should be undertaken as soon as possible. JSAP could be asked to perform such an assessment. ABA/CEELI, OSCE and CoE could be asked to assume shared responsibility for training implementation.

IV. POLICE

In democracies, the police [are] not a separate, independent force, but rather an inextricable link in the chain of justice. The police, along with prosecutors, courts, and the penal system, comprise the criminal justice system, which is in turn part of the law enforcement component of the legal system... The rule of law depends upon each component of the criminal justice system working effectively with the others. Therefore, effective and lasting police reform must be carried out in concert with reform of the remainder of the criminal justice system, namely prosecutors, courts and prisons. Those reforms must be supported by reform of the law-making

A. Background of Police in Bosnia and Herzegovina

The police structure in Bosnia and Herzegovina has undergone significant changes from the Tito era through the various wartime structures to the current post-Dayton structure. Law and order had historically been imposed on the people in the interest of the state. The traditional police role was to maintain control on behalf of whoever wields power. Therefore, the notion of policing as a public service was alien to both the police and populace. When crimes were committed, investigations were often limited to interrogation of suspects and witnesses, which was often a physical as well as verbal process.⁴⁶ There was little or no emphasis on training on the rights of individuals.

During the communist era, the police force was a basic instrument of state control in Yugoslavia's autocratic, single-party regime. Their formal functions were state security, criminal investigation, traffic regulation, executive protection, intelligence, and border/customs services. In addition to municipal police forces, a key element of state security was the Ministry of Interior Special Police (commonly referred to as MUP). During time of war or martial law, these paramilitary units were assigned to support territorial defense and maintain control of the interior of the country. MUPs were armed with rocket-launched grenades, large caliber weapons, light armor, and in some cases tanks and anti-aircraft guns. During the 1992-1995 war, MUPs in all three ethnic communities were used heavily, performing a range of paramilitary functions.....

..... Owing to the character of the Bosnia conflict, all ethnic communities sought to preserve internal security by expanding their police cadres. This was accomplished through an influx of new officers with little or no police training. An IFOR study in 1996 indicated that over 80% of the Federation police officers had fewer than 6 years of experience, and in many cases their background was of paramilitary background. The ranks were swollen with individuals having predominantly military preparation, and the flow of personnel between police and military units became quite fluid (the standard uniform of the police was the fatigue uniform of their military counterparts, and their basic weapon the AK-47). Prior to the war, municipal police forces in the larger urban areas, Sarajevo in particular, were reasonably multi-ethnic; however, the outbreak of the conflict quickly produced three ethnically segregated forces⁴⁷.

⁴⁶ Bosnia and the International Police Task Force, Michael J. Dziedzic and Andrew Bair, Policing the New World Disorder.

⁴⁷ Bosnia and the International Police Task Force

Most police stations and equipment which existed before the war were destroyed or damaged during the war. Since upkeep and investment in new buildings and equipment halted during the war, what did survive was antiquated and/or damaged. Basic items such as communications equipment, computers, police cars and criminal investigation and forensic equipment were lacking. Following the war the police infrastructure needed to be rebuilt from the ground up.

B. Bosnia and Herzegovina Police

There are currently no police established at the BiH level, although the BiH Border Service will soon be established. There will also be a need for police to provide protection for dignitaries and police to keep order in the BiH level courts, provide security for the courts and ensure that court orders are implemented.

C. Federation Police

In April 1996 representatives of the BiH and Federation governments met to discuss policing issues related to the Federation. *The Bonn-Petersberg Agreement on the Restructuring of the Federation Police* resulted from the meeting. At that time essentially two separate police forces operated in the Federation (Bosniak and Croat). The police forces were swollen with individuals with little or no police training and very little police experience. In December of 1995 a U.N. advanced mission determined that 32,750 police officers were on duty in the Federation, including 29,750 in the Bosniak areas and 3,000 in the Croat areas. Due to the wartime expansion, police strength in proportion to the civilian population was several times higher than the European standard.⁴⁸

The Bonn-Petersberg Agreement called for a common uniform, the demobilization of excess police officers, and a commitment to the principle that the composition of the police should reflect that of the population (1991 census). The Federation agreed to reduce their police forces to 11,500, a goal which was attained in 1998. All existing Federation officers have been subject to a series of background checks, including reviews by the ICTY, psychological and skills testing, as well as the mandatory training. In the Federation 79% of the police officers have completed the transitional training course and 94% have completed the human dignity training, as of 15 March 1999.

Under the structure of the Federation, the police operate independently at the Federation level and the cantonal level. The Federation Ministry of Internal Affairs, which is the Federation ministry which controls the Federation level police, is primarily responsible for the enforcement of criminal laws which are within the exclusive competency of the Federation and for the protection of dignitaries. Under the Constitution the Federation government has exclusive criminal competency for terrorism, drug crimes, organized crime and inter-cantonal crime. While the Federation attempted to delegate the responsibility for investigation of these crimes to the cantons in the Federation Law on Internal Affairs, the Federation Constitutional Court declared that attempt to be unconstitutional in May 1998.

The Federation police consists of approximately 805 police officers. IPTF has proposed a restructuring of the Federation Ministry of Interior which would move around 120 selected officers from the Anti-Terrorist Unit, which is now over-staffed with 243 members (on paper)

⁴⁸ Bosnia and the International Police Task Force

to the Crime Police Sector, which has a staff of 82 (on paper). The restructuring of what is to become the Federation Crime Unit would be a first step in unifying the Federation's crime police which are responsible for investigating the Federation level crimes. The other primary sectors of the Ministry include the Dignitary Protection Unit with a staff of 631 and the police Academy with a staff of 93.

At the cantonal level the cantonal Ministries of Interior have the responsibility for all crimes which are not within the exclusive jurisdiction of the Federation. Cantonal police are generally organized into motorized patrols, traffic patrols and criminal investigation units. As noted, police reform efforts in the Federation have seen significant progress over the past two years. After having downsized the police in the Federation in the initial phase, a main focus of IPTF's efforts will now be to review the ethnic structure of the police.

In the Cantons, police reform efforts have made considerable progress in terms of establishing joint Croat Bosniak policing although parallel structures persist primarily in Croat cantons. The police forces in eight of ten Cantons have been inaugurated after having fulfilled basic criteria established by the IPTF. Progress has been slow in Cantons 8 and 10 where the initial inauguration of the police forces - the starting point for substantive restructuring - has still not taken place. Agreement on neutral insignia for Cantons 8 and 10 and the political will to recruit minority police officers in Canton 10 remain stumbling blocks. Neither Canton has sent minority recruits to attend the Police Academy class starting in April 1999, despite having been allocated slots.

UNMIBH's efforts are now focused on introducing minority officers, predominantly Bosnian Serb and "Others", into the cantonal police forces in accordance with the Bonn-Petersberg Agreement. Minority Police Working Groups have been established in every Canton and are responsible for identifying minority candidates, both inexperienced individuals and experienced officers, for inclusion in cantonal police forces. Working groups have identified and screened more than 700 minority applicants, the majority of which have never worked as police officers. Federation officials have been asked to select candidates from this pool for testing, training and future employment. The working groups are also focusing on identifying experienced minority officers who are available for transfer within the Federation police service or between entities. The IPTF Commissioner and deputy Commissioner have begun to address the issue of inter-entity transfers of Police officers at their regular meetings with the Ministers of and Deputy Minister of Interior in the Republika Sprska and the Federation.

The failure of Cantonal governments to comply with IPTF's requirements to hire the requisite number of minority officers remains one of the main challenges of police reform. In its current "Minority Police Recruitment and Return Program" IPTF has therefore made the employment of minority officers by local police one of its main priorities. To that end, IPTF will insist on adherence to the agreed concrete steps of the Bonn-Petersberg Agreement⁴⁹, including adherence to the principles of democratic policing.

D. Republika Sprska Police

While the Bonn-Petersberg Agreement was concluded in 1996, it took much longer to reach a similar commitment from the government of RS. In December 1998 the Framework

⁴⁹ Agreement on Restructuring the Police in the Federation of Bosnia and Herzegovina, Bonn, 25 April 1996, Concrete Steps: Article 5 : "We agree that .. the Cantonal governments shall ensure that the composition of the police shall reflect that of the population, according to the 1991 census, ..". In Canton Sarajevo i.e. nearly 80 % of the new recruits in the police-academy are non-Bosniaks (source: UNMIBH, 26 March 1998)

Agreement on Police Restructuring, Reform and Democratization in the Republika Srpska was entered into between the RS government and UNMIBH (SRSG and IPTF Commissioner), and was endorsed by the High Representative.

The essential components of the agreement are: a maximum level of 8,500 police officers in RS; one uniform; a time schedule for ethnic restructuring of the police force to reflect 1997 municipal election results; the right for any person whose name appears in the 1991 census as resident in RS to be eligible to apply for any position as a police officer; recognition of the IPTF certification process and the necessity for all police officers to be certified by IPTF; agreement that all uniformed RS police officers, including new recruits, are to be trained by IPTF; an affirmation of the obligation to maintain the police force free from political influence. In the Republic Sprska 30% of the police officers have completed the transitional training course and 80% have completed the human dignity training as of 15 March 1999.

Republika Sprska has a centralized government, and thus only has one Ministry of Internal Affairs in direct control of the police in the entire Entity. The regular police is divided into nine Public Security Centers, situated in Banja Luka, Mrkonjic Grad, Prijedor, Doboj, Bijeljina/Brcko, Zvornik, Sarajevo, Srbinje and Trebinje.

According to IPTF information the present strength of the RS police is 8,391 officers⁵⁰ which is below the agreed maximum number of 8,500 in the December Framework Agreement. The main reason for the shortfall is the inability or unwillingness to recruit minority police officers. Included in this number are also police serving as border police and the special police, which is closely tied to the Ministry of Interior.

In accordance with the Framework Agreement in February 1999 the IPTF received the RS Ministry's list of 7900 individuals authorized by the Commissioner to exercise police powers. These individuals are among the training percentages mentioned above. To make room for the hiring of 2000 minority (non-Serb) officers by the end of 1999, roughly 1500 officers will have to be identified by the RS Ministry for retirement, retaining and /or redeployment to other administrative positions in other government bodies. UNMIBH is assisting this and future demobilization efforts to allow for ethnic representation in accordance with the framework Agreement. Training for a small class of minority recruits (50) is tentatively planned to begin at a facility in Doboj in April. Some 205 minority applications have been delivered by UNMIBH to the RS Ministry of Interior for consideration,

E. Training and Support

1. International Police Task Force (IPTF)

IPTF's mandatory core training program consists of three courses: a two-day information course (explaining the restructuring and its aims); a three-week transition course (a condensed version of a police academy course and focusing on basic police skills); and a one-week human dignity course (providing the modern view of the role of the police officer in society). The last two courses have been developed by and are implemented in cooperation with the U.S. Department of Justice's International Criminal Investigation Training and Assistance Program (ICITAP). To become certified by IPTF, a police officer must complete both the transition course and the human dignity course.

⁵⁰ IPTF Police Assessment Unit LPTA, 6 February 1999

Establishment of basic police academies in both entities is also a top UNMIBH priority. IPTF has assisted Federation authorities establish the Police Academy of the Federation Ministry of Interior in Vraca, Sarajevo. The 12 month curriculum developed by the Academy staff in cooperation with IPTF includes 6 months of classroom and 6 months of field training. Instruction at the new Federation Academy will be provided by a multi-ethnic staff. The first class to use this curriculum will begin in April and consist of predominantly minority candidates (Serbs and Others). UNMIBH is seeking funding to continue to upgrade the facility and expand the capacity of the Academy from 120 students to 500.

In the Republika Sprska, UNMIBH has been working with the authorities to identify a site for a new IPTF-assisted police academy and a curriculum is under development.

The Bonn Peace Implementation Conference in 1997 recommended the creation of specialized IPTF units to train BiH police to address more effectively key public security issues, such as: refugee returns; organized crime; drugs; corruption and terrorism; and public security crisis management (including crowd control). In May 1998 the Security Council authorized 30 additional IPTF monitors for this specialized training. An Organized Crime Unit, Drug Control Unit, and Public Order and Major Incident Management Unit have since been established to provide this training and advice to the police. These Specialized Training Units are conducting a wide range of in-service training in such areas as crowd control, emergency response, crisis management, negotiations, drug awareness, intelligence reporting systems, dog handling, traffic control and management (for supervisors). In-service training in other specialized areas is also conducted through bilateral arrangements.

IPTF training activities include also basic legal training under a joint project with the Organization for Security and Cooperation in Europe (OSCE). This training is linked to the new Criminal Code and Criminal Procedure Code in the Federation, and has the goal of providing the rank and file police officers a basic understanding of the most important laws under which they operate.

IPTF also provides material support, which primarily consists of police equipment but also can include the reconstruction of police stations. This support is provided to IPTF bilaterally by a number of different countries, through either in-kind assistance or financial donations. Governments which have been involved in this program are Canada, Germany, Italy, Japan, Luxembourg, Norway, Switzerland, and the UK. The IPTF assistance is conditional on the cooperation of the relevant police authority in all areas.

2. Council of Europe

In 1997 following an agreement between the UNIPTF Commissioner and the Deputy Director of Human Rights of the Council of Europe it was agreed to arrange two joint missions to Sarajevo (July and November) of Council of Europe Secretariat representative and an independent expert to prepare, in consultation with UNIPTF and staff of the local police academy (Vraca) Human Rights training material such as:

- human rights training materials with concrete examples of typical human rights problems (taken for example from UNIPTF situation reports) to be used as case studies for practice oriented training on the European Convention on Human Rights and other relevant human rights standards;
- a brochure for local police forces to be used as practical reminder of the relevant human rights standards and their relevance for police in Bosnia and Herzegovina; and

- awareness material, such as posters, for a larger public and aimed at building trust between local population and the police.

In 1998, following the above-mentioned missions drafts of a “Workbook for practice oriented teaching” and a “Reference brochure on human rights for good police practice” were prepared by R. Crawshaw and were translated into Bosnian and submitted in February to the UNIPTF Deputy Commissioner. In March of that year, in co-operation with UNIPTF and local police, a five-day training seminar and workshop took place in Sarajevo. The aim of the seminar was to train the participants on the use of the “Workbook” and the “Brochure” and the aim of the workshop was to provide the opportunity to assess the usefulness of this material and to add pertinent case studies to those already contained in the workbook. This seminar/workshop was attended by 4 local police staff (two from the Vraca academy staff and two operational police officers) and 8 UNIPTF staff. A lawyer of the Ombudsperson's Office also contributed to the seminar.

In June/July (29/06 – 02/07) a second 4-day seminar and workshop was organized for the RS police in Lukavica in co-operation with UNIPTF. A total of 25 participants who were trained as trainers for the “Human Dignity” course took part. UNIPTF assured a substantive participation of local police trainers. A staff member of the UNIPTF Human Rights Office contributed to this seminar.

This year English, French, Bosnian, Macedonian and Russian edition of the "Workbook" and the "Brochure" are in the process of publication.

2,700 copies of a set of two human rights posters for the police in Bosnian have been printed and could be distributed in Bosnia and Herzegovina once local partners will be identified for distributions. The CoE office in Mostar is organizing a distribution campaign of this material in co-operation with local police and UNIPTF. Moreover, a third seminar to train local police instructors on the use of the “Workbook” and the “Brochure” to add pertinent case studies to those already contained in the "Workbook" is likely to take place in Mostar during the summer of this year in co-operation with UNIPTF and the local police.

3. ICITAP/ United States Government

Department of Justice International Criminal Investigation Training and Assistance Program (ICITAP) is a bilateral US funded program, which is involved in police training activities in both entities.

ICITAP has worked closely with the U.S. Embassy and IPTF in Bosnia-Herzegovina since 1996. Instructors have trained Federation and RS police in crowd control, forensics, crime scene, fingerprinting, traffic investigations, and other areas. The U.S. State Department, through the Embassy, complements the ICITAP training with equipment donations. An important part of ICITAP's work has been to develop police rules and procedures and internal affairs units, working closely with each canton, the Federation Interior Ministry, and the RS Interior Ministry. ICITAP, at the request of IPTF, developed and presented the human dignity and transition courses, which are required for all BiH police officers. They also provide a full-time adviser at the Federation Police Academy. ICITAP will soon present an instructor development course to both academies. The ICITAP philosophy is to involve the local police from the beginning in each project and to train trainers.

4. Other Bilateral Programs

Swedish International Development Agency (SIDA) is financing a training project for local police instructors in both entities. The project was developed by the Swedish National Police Board in cooperation with IPTF and Ministries of Internal Affairs and the Police Academies in Sarajevo and Doboj. The project intends to train 15 police instructors in Republika Srpska and

25 instructors in the Federation in conflict resolution. It includes equipment for the instructors to enable them to continue with similar courses after the training has taken place. Each course will take two weeks and will start on 12 April in Republika Srpska and on 26 April in the Federation.

Action Plan

Significant challenges confront the entities as they move ahead with the restructuring, reform and democratization of the police forces. A lack of resources hinders their ability to modernize and to develop effective and efficient solutions to public security issues. Efforts to professionalize policing must be accompanied by the provision of equipment. UNMIBH has identified the resource needs of the local police and has drawn up a series of projects to meet these needs. Funding for these projects is obtained by donations to the UN Police Assistance trust Fund or directly to the entity by bilateral agreement, in consultation and coordination with IPTF.

It is important to recognize IPTF's mandate when it comes to police in Bosnia and Herzegovina. IPTF is active in all fields pertinent to a comprehensive strategy to improve the police. The current overall strategy developed by UNMIBH/IPTF consists of a two-pronged approach of both working on achieving ethnic balance in the police forces, and trying to build capacity by training and material assistance.

Activities of other international organizations or governments must be coordinated through IPTF to ensure that the effort will integrate with IPTF's overall program. IPTF's policy of making material assistance conditional on demonstrated political will of local police and politicians makes the argument for close coordination even more relevant.

Activities relating to police reform must in turn form part of the larger judicial reform effort, so that reforms in the police are complementary to and coordinated with other areas of rule of law reform. While the prevention and investigation of crime is perhaps the most important task of the police, it obviously can not be successfully performed without an efficient, fully functioning judiciary.

V. CORRECTIONAL SYSTEM

A. Overview

Reform of the judicial system should be carried out in parallel with a reform of the prison system in BH. Both the legal and organizational framework and the actual state of each of the facilities need to be scrutinized.

A report on a Council of Europe assessment visit to prisons in the Federation was submitted to the Federation Ministry of Justice in August 1998. The experts provide accounts of their visit

to individual prisons and analyze prison conditions, including accommodation, health services, prison work etc. The experts' general impression is that the prison system has largely recovered from the effects of the war, although there is need for improvement in accordance with the European Prison Rules, including social treatment programs for prisoners and additional human resources. In this context, special emphasis must be put on the need for separate institutions for young offenders. A similar assessment visit to the RS was carried out in November 1998.

In the Federation, the Ministry of Justice has revised the Law on the execution of punishments of the Federation of BH. In its comments of June 1998, experts of the CoE found that although the draft law provides a firm basis for a modern prison system that complies with international norms in many areas, it needs further refinement in relation to health care and disciplinary systems, including arrangements for isolation. A similar law is currently in preparation in the RS, and CoE has offered its assistance by reviewing the law. Beyond that it was suggested that prison staff be given adequate preparation and training. The UN CICP has been involved in developing and providing such training.

In the context of prison reform in the Federation, special attention needs to be given to adjusting the prison structure with the constitutional order of the Federation. In line with the conclusions of the Federation Forum in April 1998, the existence of a parallel prison system in areas of the dissolved HRHB (i.e. Mostar, Zenica) must be addressed.

In the RS, the CoE review indicated that much had been done since the end of the war to reconstruct buildings and return the prison system to efficient operations. However many current prison conditions do not meet European standards. The RS officials indicated their desire to comply with the European Prison Rules, however a lack of resources hinder those efforts.

Action Plan

Based on the CoE reports, a working group needs to be established which will identify the actions which need to be taken, identify funding and establish a time schedule. Training needs must be identified and addressed. The ongoing UN CICP training project should be part of a long-term training program for prison staff. .

Part 2. Judicial System Initiatives

I. LEGISLATIVE REFORMS

The establishment of separate judicial and legal systems in the two Entities of Bosnia and Herzegovina makes it necessary for the Entity legislators to enact new legislation at the Entity level or to bring its laws in compliance with the requirements of the constitutional and political structure of Bosnia and Herzegovina. In many cases, the laws of the Socialist Federal Republic of Yugoslavia or the Republic of Bosnia and Herzegovina which according to Annex II to the BH Constitution remained in effect for a transitional period are superseded by new laws passed at the Entity level. The international community, including OHR, CoE, UNMIBH and OSCE

have undertaken great efforts in bringing those laws into compliance with the standards of the European Convention on Human Rights and a modern European legal system. Additional efforts, however, are necessary including harmonization of the respective laws of the two Entities and adapting the structure of related laws to each other (i.e. Law on Internal Affairs, Criminal Procedure Code and the Law on Public Peace and Order).

A. Bosnia and Herzegovina

While the GFAP did not provide for a Supreme Court at the State level, the Venice Commission rendered a decision essentially acknowledging that certain State level institutions could be set up to address specific factual situations contemplated in the BiH constitution. This could include rulings concerning possible jurisdiction over BiH level officials accused of wrongdoing in connection with their official positions.

B. Federation of Bosnia and Herzegovina

1. Criminal Code and Criminal Procedure Code

In January 1997, the Federation Minister of Justice established an Expert Team on drafting a Criminal Code and a Criminal Procedure Code for the Federation of BH. In this first phase of reform, Bosnian lawyers alongside with a team of international lawyers under the lead of the Council of Europe adapted the laws to the new political structure of the Federation, introduced criminal sanctions with respect to the emerging market economy and addressed the changes necessary in view of the European Convention on Human Rights. The Codes will replace the previously applicable Criminal Code of the Socialist Federal Republic of Yugoslavia as well as the Criminal Code and the Criminal Procedure Code of the Republic of Bosnia and Herzegovina. They will also deny any further application of criminal laws of the dissolved self-declared Croat Republic of Herzeg-Bosna. On 29 July 1998, both Codes were formally adopted by the Federation legislature and on 6 November 1998 signed by the President of the Federation of BH. Both Codes will enter into force at the eighth day after publication of the Codes in the Official Gazette of the Federation.

A second phase of reform, looking into the overall structure of the Criminal laws, including the relationship of the prosecutor to the police and the investigating judge, the retention of the system of extraordinary legal remedies and the system of economic crimes must be initiated by the new Government of the Federation started in January 1999.

2. Law on Internal Affairs

Following the decision of the Constitutional Court of the Federation of May 1998, the Federation Law on Internal Affairs needs to be revised. The court found that several provisions of the law, allowing for assignment of exclusive powers of the Federation (regarding prevention and prosecution of “Federal crimes”) to the Cantonal Ministries of Internal Affairs, are not in accordance with the Federation Constitution.

A review by the CoE, including experts from OHR and UN IPTF, should also ensure full compliance with the ECHR and the recently adopted Federation Criminal Code and Criminal Procedure Code.

3. Amnesty and Pardon

Since 1996, the Federation's *Law on Amnesty* (Official Gazette of the Federation, 9/96, 19/96) has been considered to meet the minimum standards set out for wartime amnesty in Article 6 of Annex 7 of the GFAP, which provides for refugees and displaced persons to receive amnesty for all crimes committed during the conflict except war crimes and common crimes not related to the conflict. The Federation Law on Amnesty meets this definition by providing for summary release from investigation, prosecution, or imprisonment of all people within Federation jurisdiction who are suspected, charged or convicted of a set of substantive criminal acts which tend to inherently meet the Annex 7 definition. The crimes must be alleged to have been committed by 22 December 1995, the date of cessation of hostilities, in order to qualify. The basic sufficiency of the current Law notwithstanding, the GFAP amnesty provision would be more fully realized by provisions giving courts discretion to find that people accused of further categories of crime met the Annex 7 definition on the merits of their individual cases. However, given the dubious impartiality of judges appointed during the conflict, such a grant of discretion would likely be premature at this point.

The *Law on Pardon* (Official Gazette of the Federation, 9/96) is not based on any obligation stemming from the GFAP, and sets out a largely executive procedure for the release of individuals from prosecution or criminal sanction, presumably on humanitarian grounds. There have been several occasions upon which the Law has been applied to large groups of people, a phenomenon which has moved OHR to take the Law and its workings under consideration.

Action Plan

OHR, in conjunction with other international organizations, shall continue to monitor legislative efforts within the Federation to address the issues described above. Direct OHR assistance and advice on the drafting of such legislation as well as political discussions regarding the passage of such legislation will be afforded.

C. Republika Srpska

1. Criminal Code and Criminal Procedure Code

In the RS a similar reform process began in April 1998 under the auspices of the RS Ministry of Justice and in cooperation with the CoE, OHR, UNMIBH and UNCICP. The RS Expert Team drafted Codes which in large parts follow the lines of the Federation Criminal Code and Criminal Procedure Code, and which in some parts of the Criminal Code even go beyond the changes made in the Federation. The final drafts are expected at any time and will then be submitted to the RS National Assembly. As in the Federation, a second more structural phase of reform must follow immediately after the adoption of the new Codes.

2. Amnesty and Pardon

On 23 February 1999, the RS National Assembly amended the 1996 *Law on Amnesty* (Official Gazette of RS 13/96) in a manner which brought its provisions into virtual parity with those of the Federation Law on Amnesty (see "FEDERATION AMNESTY AND PARDON," above). The amendment responded to sustained OHR criticism of the previous law by deleting several provisions which were contrary to the GFAP amnesty definition. Notable among these was a provision flatly excluding several criminal acts from amnesty, contradicting the understanding that the exclusions provided in Annex VII are the only permissible ones. The remaining

barriers to full implementation of this amendment are its promulgation and entry into force and the formulation of steps to ensure its effective and uniform application.

3. Law on Internal Affairs

In June 1998, the RS National Assembly adopted the Law on Internal Affairs, despite OHR's request to remove the law from the agenda until a thorough review could be done. The law, however, reflects most of the comments made by OHR experts within a few days before the adoption of the law. The experts demanded that the scope and definition of provisions be reasonably precise, so as to ensure the necessary amount of legal certainty, they deleted all notion of statehood from the text and submitted the law to the Constitution of BH, and addressed violations of the ECHR. Their comments were guided by the CoE report of August 1997 on the previous Law on Internal Affairs, which had been passed by the dissolved RS National Assembly in June 1997 and subsequently revoked.

The current Law on Internal Affairs, however, needs to be reviewed by legal and police experts from OHR, CoE and UN IPTF to ensure full compliance with the ECHR and international standards of modern policing. Moreover, such a review must take into consideration the changes made in the reform of the RS Criminal Procedure Code.

4. Law on Public Peace and Order

In March 1998 the RS National Assembly passed the Law on Public Peace and Order which provides for criminal and police sanctions against public misbehavior of citizens. After a working group of OHR and OSCE stated concerns over the law's compliance with the European Convention on Human Rights, the CoE was requested to comment on the law. In their report of 23 April 1998, the CoE experts found that the vagueness of the law and its large number of offenses leads to a high degree of interference into the basic exercise of the fundamental rights and freedoms guaranteed by the ECHR and the Constitution of BH.

Upon submission of the report to the RS Government, the latter agreed for RS legal experts to draft a new law that takes the concerns expressed by the CoE experts into consideration and that is in accordance with the ECHR. Since no action has been taken yet, OHR and CoE need to urge the new RS Government to form a working group of RS and international experts to re-draft the Law on Public Peace and Order.

Action Plan

OHR, in conjunction with other international organizations, shall continue to monitor legislative efforts within the RS to address the issues described above. Direct OHR assistance and advice on the drafting of such legislation as well as political discussions regarding the passage of such legislation will be afforded.

II. INTER-ENTITY LEGAL COOPERATION

The continuing lack of effective inter-Entity legal cooperation between law enforcement, administrative and judicial authorities of both Entities is an ongoing impediment to fair trial and due process. While some individual courts have developed informal inter-Entity

cooperation practices, the lack of a clear legal basis for such cooperation leads to arbitrary availability of such vital procedures as, inter-alia, service of summons and recognition of documents. Moreover, more can be done to meet the increasing challenge of inter-Entity crime, including corruption, fraud and customs evasion.

A. Memorandum of Understanding

On 20 May 1998, the Ministers of Justice of the RS and the Federation signed the *Memorandum of Understanding on the Regulation of Legal Assistance between the Institutions of the Federation of Bosnia and Herzegovina and the Republika Srpska* (MoU). The MoU sets up procedures, largely channeled through the Entity Ministries of Justice, for inter-Entity tracing of witnesses, service of subpoenas, reenactments and investigations at-the-scene, etc. It was initiated largely as a pragmatic transitional solution to the numerous problems created by the formation of two separate Entity court systems in BH.

In order to facilitate these procedures, each Entity Ministry of Justice was requested to issue binding instructions and draft legislation as necessary to fully implement the MoU. Whereas the Federation submitted a first draft of instructions, no action has yet been taken by the RS.

Action Plan

OHR will continue to encourage the Entities to take all necessary steps to implement the MoU fully. However, the necessity of such further steps demonstrates the interim nature of the MoU approach. Any new ground to be broken in the area of inter-Entity legal cooperation is likely to require legislation targeted to address specific issues and the best means of securing such legislation is likely to be an active Commission on Inter-Entity Legal Cooperation (see directly below).

B. Commission on Inter-Entity Legal Cooperation

The BH Presidency, acting on the December 1997 Bonn PIC Conclusions, established the Commission on Inter-Entity Legal Cooperation on 2 February 1998, based on its power to facilitate inter-Entity coordination under Article III.4 of the BH Constitution. The Presidency decision founding the Commission sets no limits on its mandate. Therefore, the Commission is empowered both to draft concrete provisions for the implementation of the MoU and to identify and address all further needs that arise in this area. The Commission consists of eight (8) permanent members: one appointed by each BH Presidency member, two from each of Entity, and an OHR-appointed chair. The Commission met for a 4 June 1998 Inaugural session and two subsequent working sessions, at which they endorsed the MoU and made recommendations regarding accessibility and exchange of documents, land records and court files.

During the September 1998 BH elections, the Commission suspended further sessions pending confirmation of its membership. The Commission has not met again since, despite the mounting urgency of the subject matter, as recognized in the 16 December 1998 Madrid PIC Declaration, which stated in Annex II that the Commission must be "strengthened and made into an effective mechanism for inter-Entity cooperation on legal matters."

Action Plan:

On 14 April 1999, the High Representative formally requested the responsible State and Entity

authorities to confirm their appointments to the Commission or make new ones. A draft agenda for a first post-elections working session was enclosed. The Federation rapidly confirmed its two current members, but there has been no response from BH or RS. It is imperative that the Commission begin its work again and OHR must make every effort to seek confirmations and new appointments of the remaining members.

As soon as the Commission resumes its activities, OHR will urge the Presidency and the Entities to facilitate further institutionalization of the Commission's work. Rules of Procedure should be drafted and the conditions of membership must be clarified. Required attendance at regular meetings, compensation, and a permanent secretariat are likely preconditions to the creation of a self-sustaining body under the rotating chairmanship of the Presidency appointed members. Time and labor intensive issues such as drafting legislation must be dealt with by sub-commissions and sessions should end with clear and implementable recommendations to be published in the Official Gazette, where appropriate.

III. LAW DISSEMINATION

A. Official Gazettes

The Official Gazettes are currently the main tool for government when it comes to publishing information on written law and new legislation in Bosnia and Herzegovina. Traditionally courts and other interested parties in pre-war Yugoslavia subscribed to the different Official Gazettes and this was the way they received reliable information on the written law. As a result of the war and the divisions in BiH, a multitude of Official Gazettes have emerged. Today there is a BiH Official Gazette, two entity-level Official Gazettes and canton level Official Gazettes, reportedly one in each canton. The official gazettes are under control of the government.

All courts in BiH do not receive these gazettes. Some courts lack funds to subscribe to even the entity gazette. Many of the courts get the BiH gazette, but very few receive the gazette of the other entity. The explanation for this situation is not only economical, but also political. As a rule, judges are interested to get information on laws of the entity. This interest needs to be encouraged to counteract further separation of the legal systems for political reasons.

While it will be necessary to assess the system to ensure that officials that need information get it, this is not the same as saying that every court or every judge needs a subscription to all gazettes. Access and information can be guaranteed by e.g. shared legal libraries, and not least possibly by developing the availability of the Internet also to judges and other legal professionals. By creating an Official Gazette database on the Internet it is possible that problems of accurate dissemination could be solved.

Action Plan

A feasibility study must be carried out on the Official Gazettes, both on how to ensure court access to new legislation in general and whether court computerization on an Internet data base would be an adequate, and possibly complimentary solution.

B. Law Commentaries

OSCE has set up a Legislation Commentary Project that has currently four commentaries under production, including the Federation Law on Administrative Procedure, the RS Law on Criminal Sanctions, the Federation Criminal Procedure Code and entity legislation on Local Self-Government (ready for printing). These will be distributed to courts and local governments as appropriate. Additional funds in 1999 are enabling OSCE to start additional commentary projects, which will include the Federation Criminal Code and the expected reformed RS criminal procedure code and criminal code. This Editorial Committee is an integral part of the project, which in addition to an OSCE representative comprises four Bosnian lawyers. The role of the committee is to advise OSCE on commentary projects.

Action Plan

OSCE will continue with the various projects on law commentaries and dissemination of selected legal materials

C. Legal Materials to Professionals

Clear needs in this regard were identified as a result the 1998 OSCE Judiciary Survey. Judges and prosecutors in their responses revealed that most courts and prosecutor offices lack access to important domestic law. Hardly any court had access to laws of the other entity, and many courts requested earlier editions of the Official Gazettes and stated that they missed important laws in force.

OSCE has purchased and during April/May 1999 distributed a recently published comprehensive law compilation to every judge of the regular courts and every prosecutor in BiH. It contains most of the valid entity and BiH state level laws in original languages, and is modeled on the Swedish Law Book which has been in existence for some time with yearly updates. It is possible that the publishing house will make a CD-ROM version of the law book available on Internet. An envisioned development, since lawyers are likely to always prefer to have written law in hard-copy versions (on paper and in books), is to identify a BiH publishing house that would have technical capacity to publish regular updates of this law book to ensure continued availability of practical law compilations.

16 international instruments, including the ECHR, are valid law in Bosnia and Herzegovina according to the BiH Constitution. Most judges do not have access to them, why OSCE is purchasing 1000 sets of the three-volume set of international instruments published by Independent Bureau of Humanitarian Issues and endorsed by the BiH Ministry of Foreign Affairs. The sets will be distributed during spring of 1999 to all regular court judges and to all prosecutor offices.

Action Plan

OSCE will continue to take actions to ensure the widest possible dissemination of the international instruments and will continue to look into other areas that may benefit from the publications described above.

D. European Convention on Human Rights (ECHR) - Information

The Council of Europe provides targeted dissemination of documents such as the ECHR. In cooperation with the Human Rights Ombudsperson, CoE is also translating over eighty ECHR cases and a related textbook, to be made available to the legal community. CoE has also funded materials published by other organizations and institutions including the Human Rights Chamber. Finally, CoE has donated a Human Rights library to the Human Rights Center of the University of Sarajevo, on the condition that it be accessible to the public. The establishment of similar centers/libraries is currently being discussed with the Universities of Mostar and Banja Luka. USAID has developed a local network for disseminating the afore-mentioned type of information.

Action Plan

E. Dissemination of Higher Court Decisions

Before the war there were different ways of disseminating information on higher court decisions to the lower courts and other interested groups. This system broke down during the war. No satisfactory system has replaced the old system. In Bosnia some courts issue their own court bulletins with selected decisions. Some other courts use the Official Gazette, which is not necessarily the best solution since its primary function is to disseminate information on new laws and make them officially valid. In this perspective the Official Gazette is a tool for the executive and legislative branches, which makes it less appropriate for dissemination of information from the judicial branch. Another problem is that courts in certain areas of Bosnia prefer, and possibly have no choice if they want legal guidance, to receive it from higher courts in neighboring countries. Examples of this are courts in Eastern RS who still in 1998 subscribed to court bulletins from Yugoslav higher courts in Belgrade, and courts in Croat dominated areas who reportedly rely on guidance from Zagreb courts.

Action Plan

The information gathered on dissemination of higher court decisions is not complete. However, it obvious that the situation needs to be reviewed and a system of dissemination of relevant court decisions on regular and frequent basis must be ensured. An organization, or organizations, to execute the study and initiate projects to address the situation, needs to be identified.

F. Other Law Dissemination

In 1998 OSCE through its field offices distributed approximately 6,300 translated copies of the GFAP (the Dayton Agreement) to courts, other lawyers and the police.

ABA-CEELI and OSCE in early 1999 initiated a joint project to disseminate a Judges Newsletter, and the first issue was published in February. It contained articles by judges from the Federation and was published by the Federation Judges Association. The intention is to eventually make it a joint judges newsletter by and for judges in both entities. However, the two judges associations are not ready to cooperate in this project why the newsletter for now has to be published by one of the associations only. The purpose with the newsletter is to create a forum for the judges of both entities to exchange ideas and views on common issues, and to counteract further separation between the judges.

Action Plan

Other types of law dissemination projects, like the Judges Newsletter implemented jointly by ABA-CEELI and OSCE, will also continue and possibly be expanded to other legal professions.

IV. PUBLIC AWARENESS

Judicial system reform must reach not only legal professionals, but also the “consumers” of the legal system. Yet, public awareness of citizens’ rights and access by them to legal material is recognized to be insufficient and the general level of understanding of individuals of both their overall human rights and specific entitlements according to domestic legislation is fairly poor. The Madrid PIC called for better public information about the rights of citizens and the availability of legal assistance; the raising of public awareness through access to legal materials and understanding of the legal system is vital to this process.

A. Access to Legal Materials

Public information to acquaint people with the rights afforded them by the BiH Constitution, particularly under the ECHR is essential. Straight factual information is required, focusing on rights available to the individual, particularly with regard to the field of social and economic rights. Targeted public information and education campaigns are also required to protect the rights of vulnerable groups, regardless of gender, ethnicity, and religion. Information is also required in situations where reform has been achieved in particular areas of the law.

At present, dissemination of material is provided through a range of local organizations, some using TV and radio spots, mostly through printed literature. At the international level, OSCE has been responsible for some dissemination of material, both through campaigns and by way of reading rooms situated at locations around the country; SFOR CIMIC has produced a variety of human rights public information material; and CoE has donated a Human Rights library to the Human Rights Center of the University of Sarajevo on the condition that it be accessible to the public (see above). OHR has also been responsible for producing public information material in the past.

Greater effort should now be put into developing these initiatives in a co-ordinated way, particularly by building on the expertise of those with experience in the field and by involving local lawyers and law centers in dissemination of material. Training needs to be directed towards members of the civil service and human rights education needs to be included in all school curricula. In the meantime, a broad based human rights campaign is under consideration by OHR and others, as well as dissemination of material on discrimination and the rights of vulnerable groups; CoE is also investigating the possibility of establishing human rights centers in Mostar and Banja Luka.

Action Plan

Enhanced coordination needs to be developed in the short term, with both broad based and targeted campaigns carried out in 1999; education needs for civil servants and school children require assessment in the meantime, with a view to new programs being adopted in 2000 OHR, OSCE, CoE and other international organizations will lead this process.

B. Awareness of Legal System

Raising public awareness will also contribute to effective functioning of the judicial system, as persons press for the rights afforded them under the Constitution to be recognized in the courts. Indeed, in order for the strategy of reform to be successful, it must have the support and understanding of all citizens and members of society. In addition, the perception that the courts do not work properly and the system is corrupt must be eradicated and citizens must feel confident in the system that supports them. Overall, an increase in the general information available to citizens as to how the judicial system operates, how they may access their rights through it and the redress mechanisms available to them is a priority.

The Human Rights institutions themselves already disseminate material on their work as appropriate; such information is also available over the Internet and to communities overseas, although greater resources for more extensive distribution are required. In the meantime, OSCE, CoE and OHR, as above, have been responsible for the production of some public information incorporating relevant material. A number of local Non-Governmental Organizations have also been active in presentation of material to the public.

Further coverage is now required of developments in this field if public support and confidence is to be secured. Media needs to be harnessed to transmit both messages of support for the rule of law, but also details of the actual reforms taken place. Specific training directed towards members of the general public systems in operation are required. The organization of local round table discussions and community facilitation meetings on the rule of law is necessary. The broad based human rights campaign envisaged above is to include reference to such issues.

Action Plan

OHR, with the assistance and advice of other international organizations, will develop a plan of action for the use of the media during 1999. OHR will also develop specific initiatives on confidence building with an emphasis on greater information dissemination.

V. LEGAL ASSISTANCE

A. Legal Assistance

1. General

Given the complex environment in this field, which is affected by the huge number of property related cases in Bosnia and Herzegovina, a host of new legal standards and legislation as well as an alarming decrease in financial means of individuals to afford representation, the need for legal assistance is pressing. The provision of appropriate legal assistance is a key element in ensuring (equal) access to court. Efforts to facilitate that individuals can obtain legal advice and representation as necessary should therefore be a priority. The Madrid Peace Implementation Conference called for increased access to justice; government sponsored financial assistance for representation (legal aid) and a system of free legal advice and information (law centers) should be an ultimate goal of development in this field.

The natural next step would be to prepare for legislation on legal assistance. While regulating legal aid in detail, this law should however only have a facilitating function in relation to law centers. These should remain non-governmental to the extent possible.

Action Plan

2. Legal Aid (Advocacy/Representation)

A Benefits Commission (Legal Aid), established jointly by OSCE and CoE in November 1997, and currently supervised and funded by OSCE, pays for indigent clients to choose local representation. It has been involved in about 6700 cases (February 1999) and is run by seven Bosnian lawyers and social workers with only minimal supervision. Lawyers are identified and hired locally by individuals in need of advice and representation. The Commission serves all of BiH, but as the office is in Sarajevo, most of the work has been in FBiH and the opening of an RS office is therefore under consideration.

OSCE plans to improve the coverage of the Commission throughout the country, to include remote areas and the RS. The European Commission has agreed to contribute with a major share of the funding of the costs for 1999.

Government sponsored financial provision for legal representation is the ultimate objective in this context. To achieve this end it will be necessary to legislate, and to analyze to what extent legal aid of this type also should cover criminal cases. Possibly all court appointed defense counsel be funded from the same legal aid structure, which is the case in some European countries.

Action Plan

An analysis is required of the potential for financial support for legal representation and advocacy. Some study into the nature of possible supporting legislation is also advisable. Specific effort must be made to delineate between civil and criminal representation requirements.

3. Law Centers (Advice)

UNHCR currently funds 26 legal advice and information centers and 20 information centers, sometimes in conjunction with OSCE and sometimes in conjunction through other organizations, which are effectively local NGOs capable of providing legal advice. In addition, Care is running a substantial program of centers, and a variety of other donors provide funding on an ad hoc basis. These centers provide legal information and advice, referral to other services or direct representation in court, and in some cases assistance of a humanitarian nature. Problems encountered focus of course on property issues, but also very much on employment discrimination, and social policy issues; issues of domestic violence, juvenile crime and pensions rights. Particularly in property and return related fields, the centers also serve as an excellent means of gathering information and provide good oversight of the implementation of new laws.

The activities of UNHCR in this respect are to be increased by up to 50% in 1999. However, the goal of UNHCR appears to be to eventually create local refugee councils out of the legal advice and information centers which would serve as national advocacy groups for refugee law

and UNHCR refugee policy. This would mean that another organization will need to get involved in developing law centers that would provide broad based support for anyone who needs legal advice and cannot afford it.

In the meantime, a recent OHR survey of the situation in this field, calls for the need of greater coordination and practical cooperation, both between workers themselves in finding solutions to common problems; by those in the IC who can bring pressure to bear on local authorities and courts if necessary; and with funders, to ensure greater coverage of hitherto inaccessible areas, greater continuity of funding to allow for strategic planning, and greater provision of resources and training. As in the case of Legal Aid above, the ultimate objective in this field is government sponsorship of this resource.

Action Plan

Local organizations shall be encouraged to continue building their own capacity to provide effective legal advice. Alternatives for legal advice for those not traditionally served by UNHCR need to be developed by other international agencies in a manner that will allow them to be turned over to local attorneys in the long term.

VI. COORDINATION STRUCTURE

A. Judicial Reform Structure

The judicial reform effort within OHR is coordinated through an internal Judicial Reform Working Group. This body provides policy guidance for OHR in regard to judicial reform issues. Input on strategy as well as implementation issues is also provided by the Judicial Reform Coordinating Group. The Judicial Reform Coordinating Group has both a Sarajevo and Banja Luka component and is comprised of representatives of the international organizations, governmental agencies and non-governmental organizations which are actively involved in the implementation of the judicial reforms identified in the Strategy. The Group discusses progress and problems in regard to the strategic goals and when appropriate will develop alternative approaches or recommend changes in the strategy. The Sarajevo component of the Group meets every six weeks, focusing primarily on programs at the BiH level, programs which effect both Entities and programs specific to the Federation. The Banja Luka component meets once a month and while it receives information updates from the Sarajevo meeting, it primarily focuses on programs in the Republika Srpska.

The Judicial Reform Coordinating Group is further broken down into Issue Groups, comprised of representatives of both components of the group, which meet as necessary to discuss and coordinate matters relating to specific areas of judicial reform. These groups include: Training; Role of the Prosecutor; Legislative Initiatives; Courts/Judges; and Public Awareness/Education. These Issue Groups will be created or dissolved as determined necessary by the Coordinating Group.

OHR shall proceed to advance on both direct and indirect fronts to advance toward the goal of a fair and impartial criminal justice system. This shall be accomplished through the promulgation of appropriate legislation, assistance in the creation of necessary institutions and promotion of the system to the public at large. Direct involvement by OHR staff shall include, but not be restricted to: constant monitoring of this strategy, with additions, deletions and

revisions as necessary; personal contact with government officials regarding the drafting of legislation and provision of advice regarding the structure and staffing of institutions. Indirect involvement of OHR officials shall include, but not be restricted to, coordination of efforts by international organizations, non-governmental organizations and individual government agencies in implementing their individual programs that tend to advance the goal stated above.

B. Role of Strategy

The Strategy is intended to be an evolving, flexible document which will initially identify the reforms necessary to ensure that the judiciary and criminal justice system in BiH meet all the European standards for human rights and individual freedoms. As those reforms are identified and completed, additional reforms necessary to enhance the efficiency and effectiveness of the judicial system will be introduced.

The overall goal of the Strategy is that when the international community leaves BiH, there will be in place a professional independent judiciary where disputes are resolved in a timely manner, based on the facts of the cases and the law rather than on ethnic or political influences. A multi-ethnic professional police force, trained in the requirements of the ECHR and the revised Criminal Procedure Codes will protect the rights of individuals, which includes the vigorous prosecution of all crimes. Prosecutors will have assumed the role of their European counterparts and will act as a check and balance on possible police misconduct and well as ensure that the rights of the accused are respected throughout the criminal process. The Courts will also act as a check and balance on the powers of both the police and prosecutors.

Appendix 2 Judicial Reform Funding Requests Presented to the February 1999 Pre-Donor's Conference

Office of the Republic Prosecutor in Republika Srpska: Improve the capacity of the Republic Prosecutor to supervise public prosecution and take over cases from subordinate prosecutors as well as provide an appropriate check and balance system in criminal investigations by allowing public prosecutors to provide direction in police investigation. (158'410 EURO)

Office of the Federal Prosecutor in Federation of BiH: Enhance and strengthen the effectiveness of the Federation Prosecutor's Office and establish a functioning first instance jurisdiction of the Federation Supreme Court. (53'665 EURO)

Computers for Local Prosecutor's Offices in the Federation: Fund the initial phase of computerization for Cantonal and Municipal Prosecutors' offices by providing basic computer

equipment to the offices along with initial training in each Canton. (437'212 EURO)

Computers for Courts in the Federation: Fund the initial phase of computerization for Cantonal and Municipal courts in the Federation by providing basic computer support for the Cantonal and Municipal courts, case management software and initial training in each Canton. (838'704 EURO)

Computers for Courts in the Republika Srpska: Provide basic computer support for court in the Republika Srpska which were not beneficiaries of the UNDP/UNICCP program. (247'988)

Judicial Training Institutes in the Federation and in the Republika Srpska: Establish judicial training centers in each Entity to ensure that an organized, coherent training program is available to all segments of the legal profession. (168'830 EURO)

BiH Benefits Commission and Republika Srpska Branch: Ensure availability of legal aid in BiH until the BiH Government(s) can assume responsibility for a well-established and well-functioning legal aid system. (711'464 EURO)

Legal Literature for Courts and other Legal Institutions in BiH: Ensure that legal literature can be made available to different legal institutions with strategic importance for the development of rule of law in BiH. (304'352 EURO)

Budgeting System of the Judiciary in BiH: Independent budgeting procedures to assist in process of ensuring the independence of the judiciary. (59'399EURO)

Banja Luka Law Faculty Computer Center: Update the equipment of the Law faculty to access the Internet in order to communicate and exchange ideas with the Federation and elsewhere. (54'268 EURO)

Rule of Law in BiH Administrative Procedure: Carry out an assessment of the administration, similar to the assessment of the court system assigned to the UNMIBH Judicial System Assessment Program (JSAP), in order to determine the changes necessary in the administrative procedures. (66'941 EURO)

Association of Judges and Prosecutors of the RS: Improve the capacity of the Association of Judges and Prosecutors of the Republika Srpska to effectively carry out its program of judicial reform activities and to become the self-sustaining indigenous voice for judicial reform in the Republika Srpska. (42'781 EURO)

Appendix 3 Principal International Organizations Involved in Judicial Reform in Bosnia and Herzegovina

International Police Task Force (United Nations Mission in Bosnia-Herzegovina)

A. Background

The International Police Task Force (IPTF) was established by the United Nations in accordance with Annex 11 to the GFAP.⁵¹ IPTF operates under the umbrella of United Nations Mission in Bosnia and Herzegovina (UNMIBH). The IPTF mandate, described in Annex 11 as an assistance program, relates exclusively to law enforcement activities of the governments of BiH, the Federation and the RS (the Parties), and includes the following activities:

- monitoring, observing and inspecting law enforcement activities and facilities, including associated judicial organizations, structures and proceedings;

⁵¹ U.N. Security Council Resolution 1035 (21 December, 1995) created the IPTF in accordance with the Dayton mandate.

- advising law enforcement personnel and forces;
- training law enforcement personnel;
- facilitating, within the IPTF's mission of assistance, the Parties' law enforcement activities;
- assessing threats to public order and advising on the capability of law enforcement agencies to deal with such threats;
- advising governmental authorities in Bosnia and Herzegovina on the organization of effective civilian law enforcement agencies; and
- assisting by accompanying the Parties' law enforcement personnel as they carry out their responsibilities, as IPTF deems appropriate.⁵²

While IPTF's authority covers a wide range of civilian law enforcement agencies, it has focused on the monitoring, reform and restructuring of the local police. The IPTF mandate has become increasingly specialized due to added directives from the International Community and related Security Council resolutions.⁵³

Under Annex 11 the parties are obliged to cooperate fully with IPTF and to instruct their law enforcement agencies to do so as well. Annex 11 further gave IPTF the right to notify the High Representative and inform SFOR (originally IFOR) of any obstruction of or interference with IPTF activities, or a failure or refusal to comply with an IPTF request - which would constitute a 'failure to cooperate'. The Commissioner could further request the High Representative to 'take appropriate steps' upon receiving such notifications.

B. Current Mandate

The mandate and responsibilities of IPTF have evolved since the initiation of the program in 1996 through declarations of the Peace Implementation Council and U.N. Security Council Resolutions. IPTF is tasked with restructuring, reforming and democratizing local police so that civilian law enforcement agencies operate in accordance with internationally standards. IPTF has structured their responsibilities as follows:

1. *Restructuring* a post-authoritarian and post-war police force such that pre-war institutions and post-war parallel structures are transformed and consistent with democratic policing standards;
2. *Reforming* the police through training, selection, certification and de-certification procedures such that only properly trained and professional officers of high moral character serve in the police force:

⁵² Annex 11 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), "Agreement on International Police Task Force"

⁵³ At the London PIC in 1996, for example, IPTF was instructed to monitor the treatment of persons detained by the local police or the military authorities or imprisoned by the judicial system to ensure their right to due process was respected and enforced. Additional mandates include assisting local police investigations and conducting independent investigations into human rights abuses committed by law enforcement agencies and developing specialized training in organized crime, drugs and crowd control/crisis management

3. *Democratizing* the police by establishing a force that is depoliticized and impartial, accountable to a democratically elected civilian leadership, representative of the population, and that abides by the principles of community policing.⁵⁴

These criteria include the reduction of the number of police with the resulting force having an appropriate ethnic balance as well as providing necessary equipment so the officers can effectively utilize the skills they have developed through training.

C. IPTF Certification and De-certification

The IPTF certification process involves an evaluation to determine if the individual police officer fulfills certain criteria, among them completion of mandatory training programs and screening by the International Criminal Tribunal for the former Yugoslavia (ICTY). Police officers officially registered with the IPTF and therefore subject to IPTF certification criteria and standards, are provisionally authorized by the Commissioner to exercise full police powers. Officers who fail to meet the criteria and standards required for final certification are disqualified from the process and their right to exercise police powers is withdrawn by the commissioner. This is what has become known as “de-certification”. Individuals de-certified cannot exercise police powers and if he/she does so, they are subject to arrest by the legitimate police and can be detained and disarmed by SFOR. The certification procedure for police officers is an ongoing process as the ICTY screening of individual officers may take years and as new information is provided, officers may be judged unfit for service.

The authority to decertify local police officers is clearly a powerful tool and was recognized as such in the Madrid Declaration. The PIC welcomed the determination of the IPTF Commissioner to strictly apply IPTF’s non-compliance reporting and certification procedures, and to make “robust use of his powers to decertify police officers who violate provisions of the GFAP and related documents”.

D. Co-location Program

IPTF’s advisory role coupled with the Annex 11 mandate to assist the Parties’ law enforcement personnel by accompanying them as they carry out their responsibilities has resulted in the IPTF’s co-located advisor program. The co-location of IPTF monitors with police station chiefs, department heads, middle managers, PSC chiefs and Entity and cantonal Ministers of Interior has become a major tool in advancing police reform. This “on-the-job” assistance has proven to be one of the most effective methods of assessing and professionalizing the police while also advancing police restructuring and reform.

E. Human Rights Investigations

In 1996 the Peace Implementation Council, meeting in London, explicitly requested IPTF to “carry out investigations of human rights abuses by law enforcement officers” or assist authorities in investigating allegations of such abuses. Specifically, the PIC Conclusions

⁵⁴ United Nations Mission in Bosnia and Herzegovina, The United Nations Police Assistance Trust Fund, "Building the Pillars of Rule of Law and Sustainable Peace in Bosnia and Herzegovina", January 1999

welcomed “the agreement of the authorities of Bosnia and Herzegovina to investigate urgently with the assistance of the IPTF, or to facilitate an IPTF investigation into, cases in which a police officer or an official of any other law enforcement or judicial agency is accused of involvement in any violation of human rights or fundamental freedoms. The results of such investigations will be reported to the concerned Entity and relevant international bodies.” As a result of this mandate, 120 monitors with specialized investigative skills are assigned throughout the country as human rights officers.

United Nations Judicial System Assessment Program (United Nations Mission in Bosnia and Herzegovina)

On 16 July 1998, the United Nations Security Council, through Resolution 1184 (1998) called on UNMIBH to establish a program to monitor and assess the judicial system in BiH. That program was designated the Judicial System Assessment program (JSAP) and has been fully operational since early November 1998. JSAP has a regional teams in each of the seven UNMIBH regions - each of which includes territory in both Entities. The regional teams are comprised of two international Judicial System Officers (JSO) and one National Professional Officer (NPO) and two language assistants. The JSOs and NPOs all possess legal qualifications and experience.⁵⁵

JSAP has adopted a conceptual framework to monitor and assess the judicial system in BiH in three main aspects: *Technical* - covering legislation and other legal norms and standards; *Institutional* - relating to the capacity of the system in terms of physical resources, personnel and their organization; and *Political* - which concerns the political framework and factors determining the operation of the judicial system and the level of independence of the judiciary. The overall objective of JSAP is to assess the “quality of justice” in BiH as it compares to international standards of justice. In this regard, the European Convention on Human Rights has been rigorously applied by JSAP as a standard of measurement.

With the creation of JSAP, UNMIBH’s efforts undertaken by IPTF vis-à-vis the police are complemented with parallel efforts in the court system within an overall framework coordinated by the High Representative. The ambit of JSAP’s activity encompasses not only criminal justice, but all types of civil procedure within the judicial system.

The work of JSAP is crucial to a successful judicial reform program in BiH. Prior to its creation there was no mechanism which could provide a comprehensive picture of the various areas of the judiciary. Consequently the international community had to rely on anecdotal information in developing programs. Not only does JSAP provide comprehensive information on the BiH judiciary, it identifies areas which need immediate attention. As the reforms are implemented, JSAP will play a crucial role in assessing whether the reforms are effective and whether further changes should be considered.

Organization for Security and Cooperation in Europe (OSCE)

A. Legislative Reform

OSCE will contribute where appropriate to the drafting of new or amended legislation and its implementation. The OSCE field presence will continue to feed information into the legislative

⁵⁵ All information on JSAP is taken from the JSAP "Report for the Period November 1998 to January 1999"

reform process. OSCE will also participate in elaboration of strategies related to the legislative reform.

B. Programme Activities

Legal Aid Project

The Benefits Commission (BC), which was established by the OSCE together with Council of Europe, will continue as an OSCE project during 1999. The Commission consists of five lawyers and two social workers, all from BiH, and grants financial legal aid to individuals based on the economical situation of the applicant and the legal merits of the case. OSCE administrative support to the BC will continue, even though OSCE funding will be reduced and replaced by funding from the European Commission. A branch of the BC in Republika Srpska is about to be established to achieve better coverage in this entity, with possibly administrative funding from Department for International Development (DFID) of the UK. A new information campaign is under development for the project, this year describing the whole project in form of a documentary to be used for both local and international (including refugees from BiH) target groups.

The aim is to further develop independence and sustainability of the BC, but at the same time start the integration with the governmental structures. The view is that legal aid should be a governmental responsibility also in BiH. A comprehensive strategy on legal aid, including possible legislation on different types of legal aid needs to be developed.

Legislation Commentary Project

Law Commentaries provide guidance to lawyers on how to interpret and argue the law. In BiH this is particularly important in view of the rate that new legislation is adopted and all new concepts that are introduced. Under this project OSCE has so far commissioned four individual law commentary projects. The authors are all different BiH scholars or skilled lawyers. An advisory group to the OSCE, the Editorial Committee consisting of four BiH jurists of different background, has been established to help identify and prioritize among different project proposals. Currently four commentaries are under production: One commentary has already been published, *Local Self-Government in BiH* (BiH, FBH, RS). Two commentaries are under printing. The one is on the *Administrative Procedure and Administrative Lawsuit of the Federation of Bosnia and Herzegovina* (FBH), the other one is on the *Republika Srpska Law on Execution of Criminal Sanctions* (RS). A commentary on the *Federation Criminal Procedure Code* (FBH) is under production. Two or three new commentaries might be commissioned during the year. The standard that OSCE wants to achieve with each law commentary is that it becomes more of a practical and useful tool for the legal practitioner, and less a scholastic essay.

In-kind Assistance to Legal Institutions

The purpose of this project is to provide non-financial support to legal actors/institutions having strategic importance for rule of law. While the most important will be legal materials, other assistance is also possible. As appropriate, Selected Law Commentaries will be distributed under this project.

A joint project with ABA-CEELI on a Judges Newsletter is under implementation. This is an exclusive forum for judges from both entities to express opinions and share concerns on

common issues. The project includes co-operation with the judges' associations. The initial version of the newsletter is mainly a federation newsletter, but the intention is to make it a joint publication with RS judges.

In co-operation with OSCE, a Swedish publishing house has produced a comprehensive collection of Bosnian laws, modelled on a Swedish law book. The BiH Law Book contains some 250 laws, both state (BiH) and entity (Federation and RS) level laws, as well other still constitutionally valid laws. The laws are structured in nine law areas, or books. Every law is printed in the language it was originally published. The cover is in one Latin version and one Cyrillic version. The BiH Law Book was purchased by OSCE in 1,200 copies, for distribution during July of 1999 to all regular judges and prosecutors all over the country. The distribution of this private publication will for legal professionals mean easier and more complete access to the laws of Bosnia and Herzegovina.

The Dayton Agreement and the BiH constitution states that 16 International Instruments are directly valid in BiH. In spite of this do most courts and judges not have access to these conventions. OSCE has initiated the printing and purchased three volumes of Human Rights and Humanitarian Law, originally published in 1996 by the BiH Ministry of Foreign Affairs and the Independent Bureau for Humanitarian Issues, second edition in March 1999. The book will be distributed to every judge and prosecutor in BiH together with the BiH Law Book.

Judicial Training

The joint training project with IHRIG has continued during 1999. So far during 1997, 1998 and 1999 four training modules have been implemented. This is in-depth training on relevant provisions of the European Convention on Human Rights and Freedoms (ECHR). The first one on Art 14 was carried out in 1997 and two on Art 6 were held in 1998. In 1999 a module on Art 5 has been carried out. Each module consists of six trainings throughout BiH with participation on cross entity bases from judges, prosecutors and defence counsels. The fact that local trainers are training local professionals gives the project a strong element of sustainability.

A training curriculum on the Federation Criminal Procedure Code for local rank and file police officers is designed in cooperation with UNMIBH/IPTF and Federation of BiH Ministry of Interior. This includes development of a Police Handbook (reflecting important ECHR provisions now included in Federation Criminal Procedure Code and practical guidelines for police work) and a training manual for police trainers. The training program is going to be implemented by the Federation Ministry and IPTF.

A concept under development for implementation during second half of 1999 is a Prosecutors Training program for how to lead complex criminal investigations (with special focus on organized crime and corruption) and introduction of the task-force concept. This project is likely to be a joint project with the Swedish Prosecutor-Generals Office and the plans will be finalized in the near future.

In the second half of 1998 OSCE organised five Round-Tables throughout BiH where fifteen BiH judges met with five Norwegian Judges. These Round-Tables will during September be followed up in different locations in BiH by six one-day conferences for judges and politicians with the title Independence of Judiciary. The purpose is to make key politicians accountable for independence of judiciary. While OSCE have a lead role, this project will be developed in

cooperation primarily with OHR and UN Judicial System Assessment Program (JSAP). High level participation from all involved organizations has been agreed in principle.

In August and October OSCE will arrange Study Visits for BiH judges to Swedish and Norwegian courts.

OSCE together with several other organizations (ABA-CEELI, OHR, CoE) is developing a project to establish entity level Judicial Training Centers. The basic intention is to institutionalize various training projects, and also establish Bosnian ownership to, and coordination of, training provided to Bosnian judges. It is important to establish a mandatory structure for both initial and continuing training for judges and prosecutors to ensure quality in the judiciary.

Training in the field

Small, human rights specific training sessions are being considered and developed for the near future to respond to the needs of the national legal community. The trainings are intended to address specific issues that arise in specific areas throughout the country.

C. Trial Monitoring

OSCE will monitor trials and in particular those cases that have been identified as high profile, politically charged or war crimes related. OSCE monitors these cases to ensure, in particular, that,

- human rights and the rule of law are respected in individual cases;
- human rights and the rule of law are respected by the institutions in general;
- interventions occur where appropriate in the individual case;
- the judiciary applies international standards; and
- there is a general IC presence.

OSCE officers will continue to meet with the judges, lawyers and prosecutors to discuss the human rights and rule of law issues of a particular case. If necessary and where appropriate, HROs will intervene to prevent or to correct a human rights violation.

D. Intervention

Individual Cases and Daily Contact

OSCE field officers will continue to meet with judges, prosecutors, lawyers and authorities on particular cases to discuss a variety of issues including backlogs, delays, personnel and political influence. The meetings will often occur in conjunction with other international and national organizations such as IPTF, JSAP, Ombudsmen's office and OHR to achieve their goals, which include ensuring that international standards are met.

Human Rights Institutions

OSCE will work with the national human rights institutions both at head office and in the field to support the proper administration of justice in cases that ultimately arrive at the Ombudsmen institutions' offices or the Human Rights Chamber.

E. Litigation Strategy

In the absence of state sponsored free legal aid schemes and representation, some international organizations and NGOs have established legal advice and information centres to provide access to information and courts.

The OSCE will provide a field presence for the OHCHR-proposed litigation strategy. This strategy is designed to take full advantage of the existence of this network of legal aid centres helping to empower the local community to help secure the rights of individuals. The objectives of the above strategy are:

- to encourage national lawyers to rely on international instruments in their casework;
- to encourage cooperation between lawyers working on similar types of cases;
- to increase the possibility of successful pleadings in individual cases through the assistance of the international community; and
- to obtain detailed information on cases being brought forward which indicate trends of human rights violations.

The litigation strategy will involve close cooperation of the OHCHR, OHR, UNHCR, OSCE, the Federation Ombudsmen, the Office of the Ombudsperson, the International Human Rights Law Group, national NGOs and local lawyers.